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Nos. 346 and 347

IN THE

Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA,

Petitioner,

v.

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

SOCONY-VACUUM OIL COMPANY, INC., ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS

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PART ONE—The Circuit Court of Appeals correctly held that the respondents were entitled to new trials 127

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IN THE

Supreme Court of the United States

October Term, 1939

No. 346

UNITED STATES OF AMERICA,

Petitioner,

v.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.

No. 347

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is reported in 105 F. (2d) 809.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 27, 1939 (R. 3953-4). The petition for writ of certiorari in No. 346 and the cross-petition for writ of certiorari in No. 347 were filed in this Court on August 31, 1939. Both petitions were granted on October 16, 1939. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

STATUTE INVOLVED

At the time of the indictment Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, sec. 1), known as the Sherman Law, provided as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT

Foreword

The United States, the petitioner in No. 346 and the respondent in No. 347, is referred to herein as "the Govern-

ment." Socony-Vacuum *et al.*, the respondents in No. 346 and the cross-petitioners in No. 347, are referred to herein as "respondents."

In December, 1936, an indictment was returned in the United States District Court for the Western District of Wisconsin charging 27 corporations and 56 individuals with violating Section 1 of the Sherman Law.[1] On October 4, 1937, 26 of the corporations and 46 of the individuals were brought to trial at Madison, Wisconsin.[2] Prior to the submission of the case to the jury the court discharged, or directed verdicts of acquittal, or dismissed the indictment as to 10 of the corporations and 16 of the individuals.[3] On January 22, 1938, the jury returned verdicts of guilty as to all the remaining 16 corporations and 30 individuals.[4] Thereafter, the trial court, acting on motions filed at the close of the evidence, on which decision had been reserved, dismissed one of the corporations and 10 of the individuals against whom verdicts had been returned[5] and ordered new trials as to 3 other corporations and 15 other individuals.[6] The respondents are the remaining 12 corporations and 5 individuals.[7]

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[1]R. 2, 3

[2]R. 73, 74.

[3]R. 903, 912, 1149, 1890, 2284, 2351, 2380.

[4]R. 2484.

[5]R. 2490.

[6]R. 2491.

[7]In this brief, as in the Government's brief (B. 2, n. 37), the corporate respondents will be referred to by abbreviated titles as follows:

Socony-Vacuum Oil Company, Inc. (Socony-Vacuum).
Wadhams Oil Company (Wadhams).
Empire Oil Refining Company (Empire).
Continental Oil Company (Continental).

On appeal by the respondents, the Circuit Court of Appeals for the Seventh Circuit reversed the judgments of conviction upon the ground that the trial court had erred in its instructions to the jury (R. 3939-41) and in its rejection of certain defense evidence (R. 3941-2), and upon the ground that the Government counsel's use of minutes of grand jury proceedings to refresh the recollection of certain witnesses constituted prejudicial error (R. 3945-8).

The Circuit Court held that the district court had jurisdiction of the proceeding (R. 3942-4), that there was no failure of proof as to any essential allegation of the indictment (R. 3936-8), that there was sufficient evidence to go to the jury that the respondents' combination unreasonably restrained trade (R. 3938-9), and that although the district court had committed error in the admission of evidence, the error was not sufficiently prejudicial to require reversal on that ground (R. 3944-5). Judge Sparks in a separate opinion dissented from the holding that the district court had jurisdiction.

The Pure Oil Company (Pure).
Shell Petroleum Corporation (Shell).
Sinclair Refining Company (Sinclair).
Mid-Continent Petroleum Corporation (Mid-Continent).
Phillips Petroleum Company (Phillips).
Skelly Oil Company (Skelly).
The Globe Oil & Refining Company (Oklahoma) (Globe).
The Globe Oil & Refining Company (Illinois) (Globe).

The following persons are the individual respondents:

C. E. Arnott, vice president of Socony-Vacuum.
H. T. Ashton, manager of Lubrite Division of Socony-Vacuum.
R. H. McElroy, Jr., tank-car sales manager of Pure.
P. E. Lakin, general sales manager of Shell.
R. W. McDowell, vice president in charge of sales of Mid-Continent.

The Circuit Court said that it was unnecessary for it to decide whether denial of respondents' motions for a new trial constituted reversible error (R. 3945). It also refused to pass on respondents' contention that the alleged misconduct of Government counsel in argument to the jury had deprived respondents of a fair trial (R. 3950). In this connection it stated, however, that "As the case is to be reversed there seems no occasion for us to make a determination in this respect. We shall merely express the opinion that some of the argument complained of was highly improper and that, taken in connection with the misuse of the grand jury testimony heretofore discussed, would present a very serious obstacle to the affirmance of the judgment" (R. 3950).

* * *

The "Statement" contained on pages 5 to 58 of the Government's brief does not purport to set out all of the facts. It assumes that this Court is precluded by the verdict of the jury from examining facts which would support an inference contrary to the Government's conclusions (B. 30, 147).[1] It contains a number of inferences and conclusions which the respondents believe are not supported by the record.

For these reasons the respondents have prepared for the convenience of the Court a detailed digest of the evidence which is filed herewith as "Appendix A" to this brief. In that digest there will be found a description of both the excluded and the admitted evidence.

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[1]Citations to the Government's brief are designated herein "B. ——."

The statement in this brief is concerned primarily with the evidence admitted by the trial court. In certain instances, however, it refers to facts which the respondents offered to prove, but which the court excluded. Such facts are set off in brackets, thus [ ]. The facts will be considered under the headings appearing in the "Statement" in the Government's brief.

1. THE GOVERNMENT'S DISCUSSION OF "THE GENERAL OUTLINE OF THE CONSPIRACY AND THE UNDERLYING INDUSTRIAL FACTS PERTINENT THERETO" (B. 5).

Under this heading the Government purports to summarize

(1) The allegations of the indictment;

(2) The nature of the conspiracy established by the evidence;

(3) The size and competitive strength of the respondents;

(4) The relationship between the price on the spot tank-car market and the wholesale and retail prices in the Mid-Western area; and

(5) Other "business facts" which "are not as we understand substantially disputed".

These will be considered in order.

A. The allegations of the indictment.

The Government's description of the allegations of the indictment (B. 5-7) ignores the allegations of paragraph 24 of the indictment "for the reason that these allegations were not sustained by the proof" (B. 14). In thus describing the indictment, however, the Government attempts to dispose of one of the very points in issue under the respondents' cross-petition in No. 347, namely, whether there has been a complete failure of proof as to the essential allegations of the indictment (Cross-pet., 2). We, therefore, deem it appropriate to summarize briefly *our* contentions as to the allegations of the indictment. They are as follows:

The indictment alleged:

(1) That three market journals, the Chicago Journal of Commerce, Platt's Oilgram, and the National Petroleum News regularly publish quotations purporting to be gasoline prices being paid by jobbers in spot purchases from independent refiners in tank-car lots.[1]

(2) That nearly 50 per cent of the gasoline which the defendants and others sell to jobbers in the Mid-Western area is sold under contracts which require the purchasers to pay prices related to those quoted in the market journals.[2] In other words, these contracts are analogous to contracts to buy so many bushels of wheat for future delivery at the price which is reported by the Chicago Journal of

[1]Indictment, paragraph 3, R. 4.
[2]Indictment, paragraph 15; R. 11.

Commerce as prevailing in the Chicago wheat pit on the date of delivery.

(3) That the defendants conspired to falsify the market journal quotations by agreeing (a) to purchase gasoline from independent refiners (a type of transaction which would not involve sales to jobbers and so would not ordinarily be reflected in the market journal quotations); (b) to pay the independent refiners higher prices than those being paid by jobbers, and (c) to have the higher prices so paid misrepresented in the market journals as prices being paid by jobbers.[8]

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[8]Indictment, paragraphs 19, 21, 23 and 24; R. 13, 14-15, 16, and 17 which read, in part, as follows:

19. "* * * Beginning in the month of February, 1935, and continuously to the date of the presentation of this indictment, as aforesaid, defendant major oil companies * * * have knowingly and unlawfully engaged and participated in two concerted gasoline buying programs hereinafter referred to as (a) the East Texas buying program and (b) the Mid-Continent buying program, for the purchase by each of them from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields at uniform, high, and at times progressively increased prices * * *" (R. 13).

21, 23. "* * * Said purchases have been made at uniform, high, arbitrary, and non-competitive prices, and from time to time at progressively increased prices, as agreed upon by said defendant major oil companies * * *" (R. 14-15, 16).

24. "* * * While representing the price quotations published by them, as aforesaid, to be gasoline prices prevailing in spot sales to jobbers in tank car lots, and while knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers for gasoline in the prevailing forms of jobber contracts in the Mid-Western area described in paragraph 11 of this indictment, they [the market journals] have throughout said period in the Mid-Western area, including the Western District of Wisconsin, knowingly published and

B. The nature of the conspiracy established by the evidence.

The Government introduced no evidence to sustain what the respondents view as the fundamental allegations of the indictment, namely, the allegations that they had bought gasoline at prices higher than those paid by jobbers in the competitive spot market, and had fraudulently misrepresented and published such prices in the market journals as prices paid by jobbers.

The proof established the contrary. It showed that the respondents had bought gasoline at prices which in general were below and not above the prices paid by jobbers. The market journals had made no misrepresentation. They had reflected the prices actually paid by jobbers in the spot market, not the prices paid by the respondents.[1]

In their closing arguments to the jury Government counsel finally abandoned the charge of fraudulent falsification of price quotations.[2] The trial court, however, permitted them to go to the jury on the contention that, even without such fraudulent falsification, the respondents' concerted buying activities constituted an unlawful restraint of trade.[3]

The record shows that these concerted buying activities grew out of a general movement by the Government and the industry to relieve the oil industry from disastrous conditions and to correct certain competitive evils which

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circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by the defendant major oil companies as aforesaid in the said East Texas buying program and Mid-Continent buying program" (R. 17).

[1]See pp. 56-8, *infra*.

[2]R. pp. 2061, 2082, 2311-2.

[3]R. p. 2396, *et seq.*

were contributing to those conditions.[4] It reveals that the respondents, in an effort to deal with one of those competitive evils, distress gasoline, concertedly engaged in a program (1) to purchase, (2) distress gasoline, (3) from independent refiners, (4) at going market prices.[5]

Distress gasoline is gasoline which, because of technical and economic factors in the industry, the independent refiner is compelled to produce and forced to sell at once regardless of market demand.[6]

The above facts were specifically found by the Circuit Court of Appeals as follows:

> "Without going into detail as to what took place at these meetings we think the substance of what was accomplished and agreed upon was that the major companies should purchase from the independent refiners the latter's surplus gasoline at going market prices" (R. 3919).
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> • • •
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> "If there is any one thing completely established it is that the oil industry as well as numerous Governmental agencies, federal and state, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable, but necessary if the industry was to survive to say nothing of prospering" (R. 3929).

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[4] See pp. 16-38, *infra*.

[5] See pp. 44-59, *infra*.

[6] Jacobi, R. 385-6; Franklin, R. 929; McDowell, R. 1166; Frey, R. 1327. In the oil industry the economic factors responsible for distress gasoline are the rule of capture in regard to crude oil, the impossibility of shutting down crude oil wells, the impossibility of shutting down refineries without losing crude oil supplies, the impracticability of running refineries at a low fraction of capacity because of consequently increased unit costs, and the impossibility of the independent refiners' storing anything but working stocks of gasoline. See pp. 16-7, 29-31, *infra*.

C. The size and competitive strength of the respondents.

The Government asserts that "the majors" (apparently referring to the respondents)[1] "market about 85% of all gasoline sold in the Mid-Western area, the remaining 15% being a product of the Mid-Continent or East Texas independent refiners" (B. 12). No record reference to support this statement is given.

The facts are as follows:

(1) The respondents and the companies dismissed from the case for technical reasons together sold only 54% of the gasoline in the Mid-Western area in 1935.[2]

(2) They owned less than 50% of the operating refinery capacity in the territory which normally supplies the area with gasoline.[3]

(3) They owned less than 40% of the shut-down refinery capacity in that territory. The 60% of the shut-down capacity not owned by the respondents could easily have been put into operation at any time.[4]

(4) The Mid-Western area is not shut off from sources of supply other than those which normally ship gasoline into it. On the contrary, it is virtually surrounded by producing areas, some of them extremely large, which

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[1]The brief states that "the respondents in No. 346 and the petitioners in No. 347 * * * will be referred to herein as defendants or, when appropriate to distinguish between them and the other defendants brough to trial, as respondents" (B. 2). On page 7 it states that "the word 'majors', used as a noun, will mean the defendant major oil companies." These definitions suggest that the figure 85% has reference to respondents.

[2]Def. Exs. 726, 1028, R. 3189, 3812.

[3]Def. Ex. 939, R. 3611.

[4]*Ibid.* Swensrud, R. 1417, 1419.

suffer a freight rate disadvantage, compared with the normal sources of supply, of only a fraction of a cent a gallon.[5] In these immediately surrounding areas, companies other than the respondents had a straight run capacity of more than 749,000 barrels of crude oil a day and a cracking capacity in excess of 387,000 barrels of charging stock a day in 1935.[6] From these refineries the gasoline could easily have been shipped into the area by rail or water if the price in the Mid-Western area had departed from its normal relationship with prices in the rest of the country. Since, according to the United States Bureau of Mines, refineries in general were only operating at 73% of capacity, it is apparent that these refineries could have "increased their output and get hold of some new business and still have their own."[7]

(5) Standard Oil Company (Indiana), which was granted a new trial by the Court, sells about 20% of the gasoline marketed in the area and is known as the "market leader" in that area.[9] Its competition alone will not permit other companies to sell at a higher price than that offered by it.[10]

(6) Even if Standard of Indiana had been a member of the alleged combination, the evidence is undisputed that it would have been impossible for the respondents to have

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[5]Swensrud, R. 1413.

[6]Def. Ex. 740, R. 3626.

[7]Swensrud, R. 1412-16.

[8]Swensrud, R. 1458-9.

[9]Def. Ex. 1028, R. 3813; Beroth, R. 176-7; Shatford, R. 1085; Marshall, R. 1245-7.

[10]Marshall, R. 1244; Swensrud, R. 1388, 1390-1. Of course, when Standard of Indiana is undersold for any length of time, it must drop its prices (Marshall, R. 1249-50).

raised the tank-car and retail price of gasoline in the Mid-Western area to artificially high and non-competitive levels. As soon as the price in the area rose above the cost of manufacture, cheaper gasoline would have begun to flow into the area from the refineries, both inside and outside the indictment territory, which were not owned by the respondents and their alleged co-conspirators. The refiners who were not parties to the alleged conspiracy would have seized the opportunity to undersell the respondents, increase their business, and reduce their overhead costs per unit sold.[11]

(7) If there had been an attempt to maintain an arbitrary price level in the Mid-Western area, the refiners not connected with the plan would soon have captured a large share of the market. "They would just be handed the market on a silver platter."[12] Gasoline consumers react very quickly to a discrepancy in price. As soon as one marketer sells a cent or so below his competitors, he gets an increased share of the business, and the refiners who try to sell at higher prices suffer an immediate and drastic loss of gallonage.[13]

(8) Sales at lower prices by non-participating companies both outside and inside the Mid-Western area would soon have had a controlling effect on the Mid-Continent tank-car spot market prices. The non-participating companies' customers would have been able to undersell, and to take business away from, the respondents' customers. The

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[11]Swensrud, R. 1326, 1390-2. Since the costs of marketing gasoline are largely fixed costs, an increase of volume brings not only larger gross sales but larger profits per units sold (Swensrud, R. 1326).

[12]Swensrud, R. 1389-1427.

[13]Swensrud, R. 1381-8.

respondents would have had to reduce their prices in order to hold their business.[14] No group could have prevented this result unless it handled practically the whole business in the market. Even if the respondents had been doing 85 per cent of the business in the market, as alleged in the indictment, it would not have been enough.[15] As shown above, however, the respondents sold only 54 per cent of the gasoline sold in the Mid-Western area.[16]

D. The relationship between the price on the spot tank-car market and the wholesale and retail prices in the Mid-Western area.

The Government's brief states:

> "Generally speaking • • • each major retains full control over the retail price of its gasoline • • •" (B. 8).
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> "• • • the retail price structures throughout the Mid-Western area during the years 1935 and 1936 were based upon the Mid-Continent spot market quotations" (B. 9).
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> "Over 85% of majors' jobber contracts provide that the price of gasoline sold thereon should be the Mid-Continent spot market price on the date of shipment, • • •" (B. 10).

These statements standing alone might give the impression (a) that the major companies determine the price of gasoline not actually sold through their service stations; and (b) that the relationship between the retail price and the spot tank-car market was established by agreement.

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[14]Swensrud, R. 1391-3, 1425-7.

[15]Swensrud, R. 1390-1.

[16]See p. 11, *infra*.

In fact the major companies determine the retail price only of the gasoline sold through their own service stations. As the Government witness Beroth testified:

> "• • • the amount that the [independent] filling station owner is expected to sell his gasoline for over and above what it cost him is a matter of his own judgment • • •."

As appears from Exhibit 1028[1] the respondent companies sold less than 15% of their gasoline through their own service stations. This was the only gasoline of which they controlled the retail price at the service station.

The record contains no evidence that the relationship between the spot market price and the retail price in the Mid-Western area was established or maintained by agreement.[2] The Government specifically denied in its bill of particulars any claim "that each defendant 'entered into an agreement not to sell to jobbers except in accordance with the' contracts in paragraph 11 of the indictment."[3] The Government made a similar disclaimer as to the retail price policy of the Standard Oil Company (Indiana), which, according to its brief (B. 8-10), is responsible for the relationship between the spot market price and the retail price.[4] The record shows affirmatively that that policy was a purely internal matter adopted without consultation with anyone[5] and that competitive conditions controlled

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[1]R. 3812.

[2]R. 2294. Counsel for the Government stated: "If that is what you are worrying about, if you think we are charging you with sitting around a table and agreeing on a uniform retail price, don't worry because that isn't what we are charging.

[3]R. 66.

[4]R. 2308.

[5]Marshall, R. 1235-6, cross, R. 1252.

its operation. In some instances during the indictment period subnormal prices, i. e., prices which did not follow Standard of Indiana's prices, were in effect in nearly 20% of the major distributing points in the Mid-Western area.[6]

E. Other "business facts" which "are not as we understand substantially disputed".

The oil industry has certain distinguishing characteristics which must be understood in order to appreciate the background out of which this case arises. These characteristics are ignored by the Government's brief.

One of these characteristics is that the supply of the raw material—crude oil—is subject to sudden and extreme variations through the discovery of new oil fields.[1] This situation is intensified by the fact that the ownership of crude oil in the ground is governed by the "rule of capture"—he who first reduces the oil to possession owns it.[2] Consequently, in every producing field each surface owner attempts to draw as much oil out of the common pool as he can reduce to possession, regardless of market demand. Otherwise his neighbor takes it all.[3] The discovery of any large "flush" oil field is therefore immediately followed by a race for production, and this inevitably results in reducing the price of crude oil.[4]

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[6]See Def. Exs. 910-13, R. 3511. These exhibits show that in April, 1936, Standard of Indiana was posting subnormal prices at over 900 of its 4000 bulk stations (See Marshall, R. 1233).

[1]Franklin, R. 983-4.

[2]Beroth, R. 206; Franklin, R. 920.

[3]Franklin, R. 922, 927.

[4]Franklin, R. 922, 984-5.

Due to this rule of capture and to the fact that it is not possible to shut down wells temporarily except at the risk of complete loss due to subsurface changes, the ordinary economic controls of the competitive system, which tend to keep production in line with consumption, do not operate. A drop in the price of crude oil does not result in a corresponding decrease in production of crude oil. On the contrary, such a drop tends to increase production because costs are relatively fixed, and a lower price requires the production of more crude oil to meet the fixed charges.[5]

When a new flush field is discovered, the effects of these two factors extend to all branches of the industry. Out-of-pocket costs in the flush field are, for the time being, far below the level at which the great bulk of the oil required by the country has to be produced.[6] When the flush field begins producing low-cost crude oil, prices throughout the country tend to drop to the level of that part of the oversupply which comes from the flush field.[7]

If it were practicable to shut the high-cost wells down and wait until they were needed, the situation might not in the long run be damaging. But the fact is that once the high-cost or "stripper" wells are shut down there are usually subsurface changes which make it impossible to reopen them.[8]

As we shall later see, this fact led the federal and state governments to attempt to maintain the price of crude oil

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[5]Franklin, R. 927.

[6]See p. 25, *infra*.

[7]Franklin, R. 925, 927-8, 929-30; Shatford, R. 1000, 1001.

[8]Franklin, R. 923-4. As shown below, "stripper" wells are wells in which the natural gas pressure has dwindled to a point where the well will produce only a few barrels a day, even when pumped (Franklin, R. 923-4).

at a figure which would permit the stripper wells to continue operations—a minimum of one dollar per barrel.[9]

Over-production of crude oil also inevitably results in an over-supply of gasoline and a drop in gasoline prices.[10]

Between 1926 and 1930 the oil industry discovered and developed a series of new flush fields in Oklahoma and Texas.[11] The unrestrained competitive exploitation of these fields led to a serious and prolonged condition of over-production which threatened to exhaust the country's petroleum resources and to demoralize the whole industry.[12]

The oil-producing states of Oklahoma and Kansas attempted to remedy these evils by passing "conservation" or "proration" laws, limiting the amount of oil to be produced in each field.[13]

In 1930, just as proration was beginning to work, the largest oil field in history—fifty miles long and ten miles wide—was discovered in East Texas. 23,000 producing wells were drilled in the field in seven years. The Texas Railroad Commission once estimated that, if left unchecked, these wells could have produced at the rate of 300,000,000 barrels of crude oil a day.[14]

When the East Texas field was discovered, Texas had no law limiting the production of oil. The East Texas field proceeded to create a flush production "the like of which has never been known in the history of oil in the United States."[15] This flush production drove the prices of

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[9]See pp. 21, 24-25, *infra*.

[10]Franklin, R. 927-8, 984.

[11]Franklin, R. 984.

[12]Franklin, R. 984-5.

[13]Franklin, R. 984; Shatford, R. 1070; Swensrud, R. 1394.

[14]Franklin, R. 984; Beroth, R. 181, cross, R. 222; Fischer, R. 1114-5.

[15]Franklin, R. 984; Bradshaw, R. 707.

crude oil and gasoline to ruinously low levels. Crude oil sank from $1.25 to 10 cents or 15 cents a barrel. Gasoline could be bought in the East Texas field for 2 1/8 cents a gallon.[16]

In 1931 Texas passed a proration law, similar to the Oklahoma and Kansas laws, to be administered by the State Railroad Commission.[17] It proved impossible to enforce it.[18] Crude oil produced in violation of the state proration law became known as "hot oil". The gasoline manufactured therefrom was "hot gasoline".[19]

The inability of the Texas authorities to enforce the state proration laws made it possible for certain refiners in East Texas to obtain hot crude oil at prices which were substantially lower than those being posted for legal oil. This, in turn, enabled them to manufacture gasoline at a substantially lower cost than the refiners who were operating on legal crude. As a result, they could sell their gasoline for less than it cost the legitimate refiners to make it.[20]

The efforts of the legitimate refiners to meet this competition were futile. Hot gasoline crowded into the market everywhere, depriving legal gasoline of its normal outlets so that legal gasoline had to be sold at distress prices.[21]

All refiners, both large and small, suffered. Independent refiners operating on legal crude oil were faced with bankruptcy.[22] Even major companies found that the price of

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[16]Beroth, R. 208, 222; see Def. Ex. 924, R. 3530, 3575, 3579.
[17]Beroth, R. 213; Bradshaw, R. 707.
[18]Bradshaw, R. 707, Franklin, R. 984-5.
[19]Shatford, R. 1000.
[20]Shatford, R. 1000, 1001.
[21]Shatford, R. 1002.
[22]Shatford, R. 1001.

gasoline was below their cost of production. At first they used their storage capacity to build up excessive inventories at their refineries. As the price in the already saturated market sank lower and lower, however, they began dumping these inventories on the market at a loss rather than attempt to carry them over the depression.[23]

This was the situation in the spring of 1933. The competition of hot gasoline had driven the price of gasoline below the cost of manufacture. "Everybody was trying to get on the market at once," dumping gasoline wherever it could be sold at any price it would bring.[24]

II. The Government's discussion of "The formation, nature and objectives of the Mid-Continent buying program" (B. 15).

A. Background of the Program.

This section of the Government's brief opens with the statement that "The conspiracy for which respondents were convicted had its inception at a meeting held in Chicago on January 4, 1935, called for by respondent Arnott, a vice-president of Socony-Vacuum and attended exclusively by representatives of major oil companies" (B. 15). The action taken at this meeting and the purposes and motives of those participating cannot be understood except in the light of the efforts of the Government and the industry during the preceding two years. Since, except for a fragmentary footnote, the brief of the Government is entirely silent on this subject, it will be necessary to describe that history in some detail.

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[23]Shatford, R. 1001-3, 1005-6.
[24]Shatford, R. 1001.

1. *Summary of efforts to rehabilitate the industry from March, 1933 to January, 1935.*

Beginning in March 1933, the Federal Government, the oil-producing states and the industry joined in a general movement to eliminate the destructive practices described in the last section.

During the next twenty-two months the federal and state governments and the industry were seeking to accomplish three principal objectives:

(1) The restoration of the price of crude oil to a minimum of $1.00 per barrel. That was the minimum price at which the vast majority of the crude oil wells of the country could operate.[1]

(2) The restoration of the wholesale price level of gasoline at the refinery to "parity" with crude oil; that is, to a price which would reflect the normal relation between the price of gasoline and the price of the crude oil from which it is manufactured.[2]

(3) The stabilization of retail prices at a normal spread or margin between the refinery price of gasoline and the retail prices.[3]

The expedients adopted to accomplish these objectives took the form of legislation,[4] an N. R. A. Code,[5] formal industry agreements sponsored by the Federal Government,[6] and informal voluntary cooperative action on the

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[1]See pp. 24-25, *infra.*
[2]See pp. 25-32, *infra.*
[3]See pp. 32-38, *infra.*
[4]The National Industrial Recovery Act, 48 Stat. 195, Sec. 9(c).
[5]Arnott, R. p. 1687; Def. Ex. 710 for identification, R. 3141.
[6]See, *e.g.*, Franklin, R. 954; Def. Ex. 832 for identification, R 3332.

part of various groups in the industry, taken with the knowledge and often at the request of the Government.[7]

The initial steps directed at these objectives may be summarized as follows:

In June, 1933, Congress passed the National Industrial Recovery Act,[8] which provided for the adoption of codes of fair competition for industry.

Section 9(c) of that Act authorized the President to forbid the interstate shipment of oil and gasoline produced or manufactured in violation of state proration laws. On July 11, 1933, President Roosevelt exercised his authority under that section and forbade such shipments.[9]

In July, the industry was invited to submit a code under the National Industrial Recovery Act. In conference with the Government, it formulated and adopted such a code. By approval of the President in August, 1933, this Code became the law under which the industry was compelled to operate.[10]

The Code[11] included provisions which (a) forbade sales below cost;[12] (b) [required that integrated companies engaged in producing, refining and marketing conduct each branch of their business on a profitable basis];[13] (c) defined the natural parity relationship between the price of a barrel of crude oil and a gallon of refined gas-

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[7]See, *e.g.*, Shatford, R. 1027; Def. Ex. 842, R. 3360.

[8]48 Stat. 195.

[9]Def. Ex. 974; R. 3696, 3697.

[10]Arnott, R. 1687.

[11]Def. Ex. 710 for identification, R. 3141.

[12]*Ibid*, 3153-4; McDowell, R. 1212.

[13]Def. Ex. 710 for identification, R. 3141, 3154.

oline as 18.5 to 1;[14] and (d) authorized the fixing of minimum prices for crude oil and its products.[15]

The President appointed the Secretary of the Interior to be the Administrator of the Code of Fair Competition for the Petroleum Industry.[16] Secretary Ickes selected members of his staff, known as the Petroleum Administrative Board, to "advise and consult with him"[17] and "with unusual latitude for independent and unreviewed administrative and executive action and decision."[18] The Board played a prominent part in the activities for which the respondents were indicted.[19]

In accordance with the provisions of the Code, the President appointed a group of 12 (later 23) representatives of the industry and 3 representatives of the Government, known as the Planning and Coordination Committee, to aid in the administration of the Code.[20]

In September, 1933, after these initial steps had been taken, Secretary Ickes, in addressing the Planning and Coordination Committee, reviewed the progress that had been made up to that time in raising the prices of crude oil and its products and emphasized the serious nature of the work of rehabilitation which lay ahead, stating:

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[14]Def. Ex. 710 for identification, R. 3141, 3149; McDowell, R. 1181.

[15]Def. Ex. 710 for identification, R. 3141, 3150; Franklin, R. 952-3.

[16]Def. Ex. 974, R. pp. 3696; 3697.

[17]Def. Ex. 974, R. pp. 3696, 3698.

[18]Def. Ex. 974, R. pp. 3696, 3703, *et seq.*

[19]See pp. 73-91, *infra.*

[20]Franklin, R. 915, 946, 948; Moffett, R. 1149; McDowell, R. 1164; Arnott, R. 1687, 1715, Collett, R. 1801, 1804. See: Def. Ex. 710 for identification, R. 3141, 3163; Def. Ex. 835, R. 3347, 3352; Def. Ex. 967, R. 3690.

> "Gentlemen, we have a solemn duty to perform. Our task is to stabilize the oil industry upon a profitable basis. This is the keen desire of the Administration and we will work with you constantly to that end * * *."[21]

As already said, the state and federal governments and the industry had three primary objectives: (1) to restore the price of crude oil to a minimum of one dollar a barrel; (2) to restore the wholesale price of gasoline to parity with the price of crude oil; and (3) to stabilize the retail price of gasoline at a corresponding level. The pursuit of these three objectives led to the following measures.

2. *The achievement and maintenance of a price of one dollar a barrel for crude oil.*

The first objective—dollar crude oil—was achieved on September 29, 1933.[22] Thereafter, the price of crude oil was maintained at a minimum of one dollar a barrel, *at the insistence of Secretary Ickes,* throughout the Code period.[23]

[The principal reason for the Secretary's insistence on maintaining the price of crude oil at a dollar was the importance of preserving the so-called "pumping" and "stripper" wells.[24]] In these wells the flush production (*i.e.*, production by natural gas and water pressure) has been exhausted, but the wells will still produce if pumped.[25] After they have been pumped for some time, the production declines to a point where each well produces as little as

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[21]Def. Ex. 978, R. 3718, 3720.
[22]Franklin, R. 952, 953.
[23]Franklin, R. 951, 953.
[24]Franklin, offer, R. 977-8.
[25]Franklin, R. 923.

from one to five barrels a day.[26] Some 300,000 of the country's 325,000 producing wells are pumping and stripper wells. They have an aggregate production of some 500,000 barrels a day. The stripper wells alone account for forty per cent of the country's known reserves. Once shut down, they can seldom be reopened successfully. Pumping and stripper wells are, however, the most expensive wells to operate, and unless the price of crude oil remains at, or above the cost of operation, the great majority of such wells must close down.[27] This required the maintenance of the price of crude oil at, or in the neighborhood of, one dollar a barrel.[28]

3. *Attempts to achieve parity between the prices of crude oil and gasoline.*

The second objective—gasoline prices in parity with dollar crude—proved more difficult of attainment. The Code provided that the price of a barrel of 36-36.9° Mid-Continent crude oil should be 18.5 times the price of a gallon of gasoline having an octane rating of 60-64.[29] With crude oil at a dollar, the price of such gasoline under this formula should have been 5.45 or about 5½ cents a gallon.

Before the period of the indictment there was a change in the grades of gasoline so that there were no quotations

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[26] *Ibid.*

[27] Franklin, R. 924-5.

[28] The price-fixing order signed by Secretary Ickes on October 16, 1933, fixed the price of the normal Mid-Continent crude oil at $1.11 a barrel on the ground that that represented the average cost of production (Franklin, R. 953).

[29] McDowell, R. 1181; Def. Ex. 710 for identification, R. 3141, 3149, 3150.

on gasoline of 60-64 octane rating. The grades with which we are principally concerned were known as "third grade" gasoline with an octane rating of 62 and below and "regular" gasoline with an octane rating of 68-70.[32] Parity for third grade gasoline would have been about five cents a gallon and parity for regular, about six cents.[33]

In attempting to correct the conditions which were preventing the price of gasoline from rising to parity, the Government and the industry undertook the following:

(1) [The Petroleum Administrative Board's first effort to achieve parity took the form of a request for voluntary cooperation. In September and October, 1933, the Board decided that large stocks of crude oil, accumulated during the lower price range for crude, were overhanging the market and depressing the price of refined gasoline below parity. The Board thought it desirable to secure voluntary concerted action by the larger companies in acquiring and holding these stocks of crude off the market, so as not to interfere with the return of gasoline to parity with crude. They asked the respondent Arnott to try to secure such voluntary concerted effort among the large companies to remove the obstruction to the return of the price to normal levels.][34]

(2) On October 16, 1933, Secretary Ickes approved an order fixing minimum prices based upon the costs of production and manufacture for crude oil, gasoline and other petroleum products.[35]

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[32]Beroth, R. 179; Lanzer, R. 267-8; Steiger, R. 732.

[33]See Lanzer, cross, R. 260, 267-70; Steiger, R. 732-3.

[34]Franklin offer, R. 992-4.

[35]Franklin, R. 952, 953.

(3) The price-fixing order never became effective. As a substitute, the industry suggested that the integrated refiners should form a group known as the "National Petroleum Agency."[35] [This was the first proposal to deal with distress gasoline through purchases by the large refiners. The members of the Agency agreed to subscribe the sum of $10,000,000 and "to purchase, hold, and in an orderly way, dispose of gasoline which threatens the stability of the oil price structure in an effort to bring the prices of gasoline into proper relationship with the present price of crude oil. * * *"][37] Twenty-three of the larger companies, including all of the corporate respondents except Globe, agreed to the plan and it was approved by Secretary Ickes on January 24, 1934, but never put into operation.[38]

(4) In April, 1934, an amendment to the Code was adopted under which an attempt was made to balance the supply of gasoline with the demand by allocating the amount of crude oil which each refiner could process.[39] [One of the purposes of this amendment was to aid the non-integrated refiners by reducing the production of the large refiners and thus to force them to increase their purchases from the small non-integrated refiners.][40] This amendment also provided for formal buying arrangements, similar to the National Petroleum Agency Agreement.[41]

(5) [In May, 1934, another voluntary cooperative effort was undertaken by the industry. The Planning and Co-

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[35]Franklin, R. 953-4.
[37]Def. Ex. 832 for identification, R. 3332, 3336.
[38]Franklin, R. 954; Def. Ex. 832 for identification, R. 3332.
[39]Def. Ex. 835, R. 3347; Shatford, R. 1006-7.
[40]Shatford offer, R. 1038-41.
[41]Def. Ex. 835, R. 3347, 3350.

ordination Committee addressed a resolution to the major companies calling upon each of them to purchase 3 per cent of its requirements of gasoline from independent refiners. Some of them did so, but no substantial improvement appeared in the market.][42]

(6) Thereafter the Administration sponsored a series of formal "buying programs" whereunder the major companies contracted to relieve the independent refiners of their surplus gasoline, and sometimes of their entire output, at prices above the going market. Four of these programs were formally approved by Secretary Ickes.[43]

* * *

In spite of these efforts the Government and the industry did not achieve their second objective, namely, the restoration of the price of gasoline to parity with crude oil at one dollar per barrel.[44] The problems of "hot oil" and "distress gasoline" remained unsolved.

Hot oil:—The Government was unable to check the flow of hot oil out of East Texas. Refiners in the field could procure such oil for thirty-five cents or less a barrel, and manufacture gasoline from it for 2 or 2½ cents a gallon.[45] Most of this hot gasoline flowed into interstate markets where it competed with gasoline manufactured from dollar

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[42]Shatford offer, R. 1048.

[43]Arnott, R. 1702, 1703, 1799, 1800; Shatford offer, R. 1048-50, 1056. Def. Exs. 844 for identification, R. 3367; 845 for identification, R. 3372; 846 for identification, R. 3376; 847 for identification, R. 3386; 917 for identification, R. 3522.

[44]McDowell, R. 1164-5, 1166; Swensrud offer, R. 1430.

[45]Bradshaw, R. 707; Franklin, R. 984-5; Beroth, R. 208, 222; Shatford, R. 1002.

crude.[46] This resulted in a double price level. Inevitably the competition of the cheap "hot" gasoline forced the price of legal gasoline down below the cost of production.[47]

Distress gasoline:—There was, however, another reason why the tank-car price of gasoline refused to rise to parity during 1934. There were large quantities of "distress gasoline" on the market—that is, *legal* gasoline manufactured by independent refiners who had to dump it on the market for whatever price it would bring.[48]

The independent refiners' purchase contracts required them to take all the crude oil which their sellers were permitted by law to produce. Any shutdown of their refineries, therefore, would have resulted in the loss of their crude connections. It was impossible to curtail production very substantially since operation at a low fraction of capacity would have involved a very heavy increase in the unit cost of the product.[48a] Thus they were compelled to manufacture gasoline, whether or not they had customers for their whole output.[49]

Once the gasoline had been manufactured, the independent refiners were faced with a further problem which resulted from the restricted character of their operations. Few of them had any substantial amount of storage capacity either for crude oil or for gasoline. Each had to refine the crude oil as he received it and sell his gasoline as fast as he made it.[50] At the same time, however, they lacked

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[46]Shatford, R. 1001; Fischer, R. 1117; McDowell, R. 1165, 1166.
[47]Shatford, R. 1001.
[48]Shatford, R. 1001.
[48a]Gray, R. 1827-8.
[49]Franklin, R. 926, 930.
[50]Franklin, R. 929-30; Shatford, R. 1003, 1010; Gray, R. 1827-8; McDowell, R. 1166.

both bulk plants and filling stations. There was no place to dispose of the over-supply of gasoline at the regular market price. As a result, such gasoline became "distress" or "surplus" gasoline—that is, gasoline which could be neither stored nor sold at the market price, but which had to be disposed of immediately. Inevitably it was dumped on the market for whatever price it would bring from buyers who were under no compulsion to buy at any time and who could take full advantage of such forced sales.[51] Furthermore, the depressing effect which distress gasoline had on the market tended to be magnified because the gasoline was frequently "pyramided"—*i.e.*, offered simultaneously through several different brokers, so that it was, in effect, competing with itself.[52]

The forced sale of distress gasoline at prices even below the depressed general market price was thus an important factor in nullifying the efforts of the Government and the industry to restore the tank-car price of gasoline to parity.

The Government in its brief argues (B. 39-48) that distress gasoline did not constitute a competitive evil. That

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[51]For description of this problem see Jacobi, R. 385-6; Cline, R. 642; Bradshaw, R. 671-2; Steiger, R. 751-2; Franklin, R. 929; Shatford, R. 1003; McDowell, R. 1166; Frey, R. 1327. The effect of distress gasoline was not confined to the spot tank-car market. As shown in the next section, it made excellent ammunition in retail price wars, and tended to increase both their number and severity. Price-cutters, who would ordinarily have had to buy their supplies at the market price, were able to pick up distress materials at substantially lower prices and thus to sell at still greater differentials under the regular prices of the branded operators. (Frey, R. 1328; Arnott, R. 1691.)

[52]Shatford, R. 1003-4; Gray, R. 1823. A broker is a middleman who acts as a sales agent for an independent refiner. Sometimes he takes title to the gasoline which he markets, in which case he pays from ⅛ to ¼c below the market. (Beroth, R. 178.)

argument is dealt with at pages 103-12, *infra*. No one, except the writer of the Government's brief, seems ever to have doubted the existence of distress gasoline as a competitive evil. The Secretary of the Interior referred to it in the fall of 1934;[53] the Petroleum Code Committee on Small Enterprise appointed by the Secretary recognized it in March, 1935;[54] and the Circuit Court of Appeals found the existence of the evil to have been conclusively established.[55]

The effect of hot oil and distress gasoline: The demoralization of the tank-car market which resulted from the presence of hot gasoline and distress gasoline injured every element in the industry. All refiners were selling below cost.

It cost one major oil company—the White Eagle Division of Socony-Vacuum—4⅛ cents a gallon to manufacture third grade gasoline and 4⅞ cents to manufacture regular.[56] [In the middle of October, 1934, however, the price of third grade gasoline ranged from 2½ cents to 3¼ cents and the price of regular from 4 to 4⅝ cents.][57]

The independent non-integrated refiners operating on legal crude oil suffered even more severely. They had to pay a dollar a barrel for all the crude oil they refined. Furthermore, their refining costs were higher. With crude oil maintained at a dollar, it cost most of them about 5 cents to manufacture a gallon of third grade gasoline.[58]

There was only one temporary period of relief from this situation. In October, 1934, Secretary Ickes issued an order[59] which made it illegal to ship crude oil or gaso-

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[53]Def. Ex. 968, R. 3690.
[54]Def. Ex. 924 for identification, R. 3530, 3558.
[55]R. 3929.
[56]Govt. Ex. 306, R. 2957.
[57]Def. Ex. 849 for identification, R. 3397.
[58]Franklin, R. 935; see Lanzer, R. 270.
[59]Def. Ex. 6, R. 2601.

line out of East Texas in interstate commerce unless it were accompanied by a certificate or tender issued by a "Federal Tender Board", certifying that it had been legally produced or manufactured. The shipment of hot gasoline out of East Texas immediately stopped[60] and prices rose abruptly.[61] In the latter part of November, however, the enforcement of Section 9(c) was enjoined by a number of East Texas refiners. Subterfuges were employed to evade the law.[62] [The price of gasoline once more declined.][63]

4. *Stabilization of the retail market—the General Stabilization Program.*

We come now to the efforts to accomplish the Administration's third objective—stabilization of the retail market. The attempts to accomplish this objective have a direct bearing on the activities for which the respondents were indicted.

Throughout the period described above, while the tank-car market was resisting all efforts to raise it to parity, the retail market was being swept by a series of price wars.[64]

The price wars in 1934 surpassed in number and extent any in the history of the industry. It was unusually easy for a price-cutter to start a price war at this time, for there were huge quantities of hot and distress gasoline available. Both kinds could be purchased at prices so far below the going tank-car market that the price-cutter could cut below any differentials which the other operators could

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[60]Lanzer, R. 258.

[61]McDowell, R. 1223; see also Def. Ex. 949 for identification, R. 3642; Shatford offer, R. 1061-2; Van Covern offer, R. 1498-500.

[62]Lanzer, R. 258; see Van Covern offer, R. 1500-1.

[63]Van Covern offer, R. 1500-1.

[64]Frey, R. 1274-5.

tolerate without losing a substantial amount of their business.[65]

Sellers of gasoline which is not nationally advertised usually have to take a slightly lower price for their product. If, however, the spread between the price of the unbranded product and the advertised brand becomes substantial, the sellers of the branded product must lower their prices and reduce the spread or else see a large part of their business go to the unbranded marketers.[66]

In 1934, therefore, when the unbranded operators attempted to increase their gallonage by selling under the normal differentials, the branded operators made similar cuts to protect their business. The price-cutters would then make further cuts to maintain their advantage, the branded operators would retaliate,[67] and the process might be continued until all parties were selling below the cost of production.[68]

The Petroleum Administrative Board itself tried for a time to deal with these price wars. Early in 1934 it commenced negotiating agreements between the marketing companies and persuading individual companies to raise their prices voluntarily.[69] The price wars, however, continued to increase both in number and in intensity.[70]

Finally, on July 20, 1934, Secretary Ickes wrote the following letter[71] to the respondent Arnott.

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[65]Shatford, R. 1002; Frey, redirect, R. 1327, 1328; Arnott, R. 1691, 1710.

[66]Swensrud, R. 1451, 1456-7. See, also, Swensrud, R. 1385; McDowell, R. 1172-3; Marshall, R. 1316-7; Frey, R. 1328; Arnott, R. 1691.

[67]Arnott, R. 1691.

[68]Frey, R. 1274.

[69]Frey, R. 1276.

[70]Def. Ex. 910, R. 3509; Def. Ex. 911, R. 3510.

[71]Govt. Ex. 891, R. 3487.

"ADMINISTRATOR OF THE PETROLEUM INDUSTRY

Washington
Interior Department Building

July 20, 1934

Mr. C. E. Arnott, Chairman,
Marketing Committee,
Planning and Coordination Committee,
Investment Building,
Washington, D. C.

My dear Mr. Arnott:

It has been brought to my attention that the market for gasoline and other petroleum products has recently been disturbed by numerous price wars in many different localities and states. This has resulted in causing petroleum products to be sold below cost in some areas in order to meet unrestrained competition, and has in turn depressed the wholesale market for such products, thereby leading to the building up of surplus and to the economic and physical waste consequent thereon.

Such conditions have a strong tendency toward, and in many instances have resulted in, the payment of wages below the minimum established by the Code, and in the working of employees for a period beyond the maximum hours provided for by it. Furthermore, price wars necessarily injure small independent marketers who are unable to dispose of their products profitably when prices sink to ruinous levels. It would appear, therefore, that we are faced with conditions which would, if uncontrolled, tend to frustrate the purposes of the National Industrial Recovery Act by increasing unemployment, reducing standards of labor, and preventing the rehabili-

tation of industry, which the Act was intended to achieve.

Under Article VII, Section 3 of the Code it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am, therefore, requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board acting alone to deal with each specific situation. Therefore, I am requesting and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar. Any activities of your Committee must, of course, be consistent with the requirements of Clause 2 of Subsection (a) of Section III of the Act, and if in any situation it should appear that this section is not being complied with, the matter should be referred to the Petroleum Administrative Board.

I trust that I can count on your cooperation.

Sincerely yours,

/s/ HAROLD L. ICKES,

Administrator of the Petroleum Industry."

The Government states that the meeting of January 4, 1935, at which it claims the conspiracy "had its inception," was one of a series called under Secretary Ickes' letter of July 20, 1934 to consider elimination of retail price wars. It adds that "at this meeting those present *saw fit* to embark upon a discussion of the desirability of raising spot market prices and the whole level of gasoline prices in the Mid-Western area" (B. 16, italics supplied). This statement makes it necessary to discuss the facts which explain why a meeting called under the letter of July 20, 1934 turned its attention to distress gasoline on the tank-car market.

On July 9, 1934 (eleven days before Secretary Ickes wrote Arnott), members of the Petroleum Administrative Board called on the Planning and Co-ordination Committee's Marketing Committee, of which Arnott was chairman, and asked him if he would undertake the responsibility of heading a voluntary, cooperative movement to deal with price wars.[72] They said that the situation was entirely out of hand; that price wars had become so numerous that it was physically impossible for Secretary Ickes or the Board or its enforcement agents to deal with them; and that the only possible solution was to turn to the industry code authorities, who had an extensive and highly integrated organization in every section of the country.[73]

Arnott pointed out that it would be impossible to stabilize the retail market unless hot oil and the sale of distress gasoline on the tank-car market were eliminated.[74] The members of the Board replied that if he were willing to

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[72]Arnott, redirect, R. 1796-7.
[73]*Ibid.*
[74]Arnott, redirect, R. 1797-8.

take the responsibility of dealing with price wars, they would not attempt to tell him how to do it.[75]

Upon receiving Secretary Ickes' letter of July 20, 1934, appointing him chief stabilizer, Arnott asked Louis Titus, the counsel for the Planning and Coordination Committee, as to its effect.[76] [Before replying to Arnott, Titus talked the situation over with Fahy, the Acting Chairman of the Petroleum Administrative Board. Titus suggested to Fahy that, when Arnott made voluntary arrangements among competitors for restoring prices, they should be brought to the attention of Secretary Ickes and approved, because they might perhaps be questioned under the Anti-Trust Laws. Fahy ridiculed this idea; said it was wholly impracticable; that Titus was afraid of his own shadow; that it was unthinkable that Arnott and those who might assist him could ever be assailed for doing what the Government wanted them to do. Titus reported this to Arnott, and wrote an opinion[77] stating that this letter did not and could not give any immunity from the provisions of the Sherman Law, but that these voluntary concerted efforts would be in the direction of eliminating destructive practices and would not be monopolistic in character and that it was unthinkable that they would ever be attacked by the Government which was encouraging them.][78]

Arnott proceeded to set up a new organization—the Stabilization Committees. He appointed a "General Sta-

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[75]Arnott, redirect, R. 1798.

[76]Arnott, R. 1737.

[77]Def. Ex. 892 for identification, R. 3489.

[78]Titus offer, R. 1833-5.

bilization Committee" with headquarters in Washington, and a Regional Stabilization Chairman in each Region. The latter, in turn, set up complete field organizations, appointing state and local committees.[79] For a time, the program was carried on by the local committees acting locally. The Petroleum Administrative Board and the committees soon discovered, however, that it was impracticable to solve the problem on a purely local basis. Accordingly, the scope of the program was gradually expanded to deal first with larger areas, such as states, and then with the problems of several states at once.[80]

The Petroleum Administrative Board was kept in close touch with what was going on, both through its own participation in the stabilization work and through reports from Arnott.[81]

B. The formation of the Mid-Continent buying program.

On January 4, 1935 there was a General Stabilization Meeting at the Blackstone Hotel in Chicago.[1] Arnott advised the meeting that the stabilization committees throughout the Mid-Western area had achieved a considerable but precarious measure of progress in stabilizing the retail markets.[2] In the course of the discussion, those engaged in stabilization efforts expressed the opinion that the gains achieved in stabilizing the retail markets could not be maintained unless something were done about distress gasoline.[3] Representatives of the small independent

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[79]Arnott, R. 1688.
[80]Frey, R. 1275, 1276; McDowell, R. 1173.
[81]Frey, R. 1267, 1275-7; 1334.
[1]Arnott, R. 1689.
[2]Arnott, R. 1689, McDowell, R. 1168.
[3]Arnott, R. 1691-2; McDowell, R. 1168.

refiners complained of the failure of all previous efforts to secure a return of the price of refined gasoline to parity with the crude oil price of $1.00 a barrel. They said that unless something were done to relieve their plight they would be forced either to close down or to withdraw from Code activities, so that they would no longer have to observe the Code standards of wages and hours, or to unite in cutting the price of crude oil.[4]

As a result of this discussion, Arnott appointed a "Tank-Car Stabilization Committee" to study the situation and make a report.[5] He selected as members of this committee men who were familiar with the problems of the industry and who had been identified with Code activities from the time of the Code's adoption.[6] As finally composed, the committee consisted of the respondents McDowell, Ashton, and Lakin, and five former defendants, A. M. Hughes of Phillips, E. Karstedt of Continental, I. A. O'Shaughnessy of Globe, E. J. Bullock of Standard of Indiana, and O. J. Tuttle, of Empire, all of whom were either discharged or granted new trials.[7]

Three days after the Tank-Car Stabilization Committee was appointed this Court held Section 9(c) of the N. I. R. A. unconstitutional in the so-called "*Panama* case."[8] Since its establishment in October, 1934, the first Federal Tender Board had been fairly successful in check-

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[4]Arnott, R. 1693-5; McDowell, R. 1168-9.

[5]Arnott, R. 1696-7; McDowell, R. 1169.

[6]Arnott, R. 1696-7.

[7]McDowell, R. 1169; Arnott, R. 1696-7. Lakin and Tuttle were not originally members of the committee. On March 5, 1935, they took the place of their superiors, Van Eeghen and Miskell (McDowell, R. 1193).

[8]*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (January 7, 1935); McDowell, R. 1177-8; Arnott, R. 1700.

ing the flow of hot gasoline into interstate commerce.[9] When the Board was stripped of its power, there was a renewed influx of hot gasoline into the Mid-Western area.[10] As a result, the tank-car market went down and the problem of restoring the price of gasoline at the refinery to parity with crude oil was still unsolved.[11]

The Tank-Car Committee held three preliminary meetings: one on February 5th in Chicago, which saw a plan proposed to deal with distress gasoline and remove its depressing effect from the spot market,[12] another on February 11th in Chicago to sound out sentiment on the plan and to bring it to the attention of companies not represented on the committee;[13] and the third on March 5th in St. Louis to explain the plan to a committee of independent refiners which had been appointed at one of Arnott's stabilization meetings a few days before.[14]

As stated by the Government, the commencement of the Mid-Continent Buying Program was postponed until after hot oil had been eliminated by reason of the passage of the Connally Act. The Government, however, says that "The Tank-Car Stabilization Committee agreed that until this flow was stopped, the majors could not succeed in raising and controlling Mid-Continent spot market prices." The record references given by the Government (R. 1180, 1184-6, 1192) do not mention the word "con-

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[9]See pp. 31-2, *supra*.

[10]McDowell, R. 1177; Dyer, R. 1467-9.

[11]McDowell, R. 1177; Van Covern, R. 1511.

[12]McDowell, R. 1178, *et seq.*, and see Govt. Ex. 177, R. 2733.

[13]McDowell, R. 1186, *et seq.* Sus, R. 1866, *et seq.* and see Govt. Ex. 376, R. 2977.

[14]Jacobi, R. 362, *et seq.*; McDowell, R. 1192, *et seq.*

trol" and in no way support the conclusion of the Government that the committee's purpose was price "control". The pertinent facts are as follows:

At the first meeting of the Tank-Car Committee on February 5, 1935, the following situation was disclosed:

> (1) It was hopeless to attempt any stabilization of the tank-car market until the Federal Government had put an end to the flow of hot gasoline from East Texas.[15] As two members of the Committee put it, "With hot gasoline moving out of East Texas as it was, any buying in the Mid-Continent would be just like mopping up the ocean."[16] [As shown by Defendants' Exhibit 917 for identification, the reason for the final discontinuance of the 1934 buying programs had been "the excessive amount of overproduction in Texas."][17]
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> (2) After the problem of hot gasoline had been disposed of, the presence of distress gasoline overhanging the market would be the sole remaining factor preventing the tank-car market from reaching a normal competitive level. It was estimated that there would be about six or eight hundred tank-cars of distress gasoline produced in the Mid-Continent oil fields every month.[18]
>
> (3) Although there were ten or twelve major oil companies buying regularly from independent refiners in the Mid-Continent area, their purchases did not solve the problem of distress gasoline because

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[15]McDowell, R. 1180, 1185.
[16]McDowell, R. 1180.
[17]R. 3522, 3524.
[18]McDowell, R. 1179, 1182.

they bought habitually from a few large independent refiners who had more than enough business already.[19]

(4) As a result, there still remained a number of small independents who had distress gasoline on their hands and who were unable to dispose of it except at distress prices.[20]

As Ashton said at a subsequent meeting the small independent refiners who could find no purchasers for their gasoline were "wall flowers at the economic ball." In order to meet this situation, "dancing partners" were needed.[21]

Everyone on the committee was opposed to having another formal buying program such as those which the Government had sponsored in 1934, with each of the major companies obligating itself to purchase a definite quantity of gasoline from designated independent refiners at a fixed price above the market. Furthermore, each company wanted to determine for itself how much gasoline it should buy and from whom and at what price. Several of the representatives of the major companies were of the opinion that the only thing to do was to cut the price of crude.[22]

There followed a discussion in which all members of the committee participated.[23] Finally, Ashton summarized the general feeling as follows:

1. Purchasing power already in existence should be used, but more effectively directed to deal with the

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[19]McDowell, R. 1182-3.
[20]McDowell, R. 1183.
[21]McDowell, R. 1188, see also, Jacobi, cross, R. 479.
[22]McDowell, R. 1179-81.
[23]McDowell, R. 1181-2.

distress product. The ten or twelve major companies which were habitually buying gasoline for their needs should buy distress gasoline so far as possible from the refiners who needed help instead of from those who were able to dispose of their products through other channels.

2. There were to be no formal contractual commitments such as had been found objectionable in the 1934 programs. The committee would assemble information as to the quantity and whereabouts of distress gasoline. This information would be put before the purchasing companies so that each could decide to what extent it could and would purchase this distress gasoline.

3. There would be no agreement to buy at a price above the market as in the other programs. It was recognized, however, that the independent refiners owned distress gasoline which they had to dispose of. This created a real problem, for, obviously, the major companies might take advantage of the depressed condition of the independent refiners and bid down the price of gasoline still further. It was, therefore, felt that the purchasers ought to pay the going market price, that is, prices not out of line with those being paid by jobbers in the open spot market.[24]

The essentials of this plan were discussed at the second meeting on February 11th[25] and reported to Arnott.[26]

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[24]McDowell, R. 1182-4, 1203.

[25]McDowell, R. 1186, *et seq.* Sus, R. 1866, *et seq.* and see Govt. Ex. 376, R. 2977.

[26]McDowell, R. 1185; Arnott, R. 1701-3.

C. The Mid-Continent buying program in operation.

It will be recalled that the members of the Tank-Car Committee had recognized that so long as cheap hot gasoline was available, no one would be helped by the removal of the competitive evil of distress gasoline.[1] When the original suggestion was made on February 5th, Congress was already considering legislation to deal with the problem, and it was expected that such legislation would shortly be enacted. On February 22, 1935, Congress passed the Connally Act to replace Section 9(c) of the N. I. R. A.[2] On March 1st, Secretary Ickes set up a new Federal Tender Board thereunder. Within a few days, the shipment of hot oil and hot gasoline out of East Texas had been virtually eliminated. On March 2, the price of gasoline began to rise.[3] On March 8th the Mid-Continent buying program was put into operation.[4]

As the Circuit Court of Appeals found (R. 3919), the program in essence involved (1) the purchase of distress gasoline, (2) in the hands of the independent refiners, (3) at going market prices.

There was concerted action under this program. Such action took the following form:

> (1) The Tank-Car Stabilization Committee had A. V. Bourque, the Secretary of the Western Petroleum Refiners' Association, make a monthly survey which would show the amount of distress gasoline which each independent refiner would have during the month.[5]

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[1]See p. 41, *supra*.

[2]49 Stat. 30.

[3]McDowell, R. 1199, 1201; Van Covern, R. 1512, See Def. Ex. 1024, p. 66, *infra*.

[4]McDowell, R. 1199-1200.

[5]Jacobi, R. 397, 399.

(2) From March, 1935, through February, 1936, the Tank-Car Committee met once a month. At such meetings the surveys showing the amount and location of distress gasoline were presented and discussed. Each member of the committee would indicate the amount of distress gasoline which his company would be purchasing during the ensuing month and the refiner or refiners from whom it would prefer to purchase.[6]

(3) After each meeting, the purchasing companies which were not represented on the committee were requested to purchase, if they could, any gasoline which would not be taken care of by the members of the committee.[7]

(4) A "Mechanical Sub-Committee" consisting of McDowell, Tuttle and Jacobi was appointed for the purpose of finding purchasers for any new surplus gasoline which might appear between the meetings of the Tank-Car Committee. Its duties were to collect information concerning such additional distress gasoline and to pass this information on to the purchasing companies.[8]

(5) To prevent the information disclosed by the survey from being used unfairly by the major companies in buying distress gasoline from the independent refiners, it was part of the plan that the going market price should be paid for such gasoline. The Mechanical Sub-Committee used its efforts to

[6]Jacobi, R. 397-400; McDowell, R. 1207-8.
[7]Jacobi, R. 432, 452.
[8]Jacobi, R. 395; McDowell, R. 1187-8, 1189, 1206.

this end. We shall presently refer to the measures which it took.[9]

* * * *

The Government states (B. 20) that "The independent refiners were actively cooperating with the mechanical subcommittee in advancing spot market prices." In support of this assertion the Government quotes from Exhibit 176. That exhibit is an intra-office memorandum dated March 8, 1935, from A. P. Ruether, the manager of Shell's crude oil purchasing department, to the respondent P. E. Lakin, who was then Shell's sales manager, and R. P. Bascom, a vice-president of that company. The parts relied upon by the Government (B. 92) read as follows:

> "I have been in touch with Mr. Winget of Cushing Refining and Gasoline Company who tells me he feels that prices should move faster—that prices discussed should be reached by the 11th, and is quoting today, 3⅝¢ and 4⅝¢ on low and middle octane respectively."

Does this exhibit support the inferences, either (1) that prices were being artificially controlled at this time; or (2) that the respondents or their subcommittee had designated a price which the independent refiners were attempting to meet?

The exhibit was written on March 8, 1935. The Shell executives had not been informed that the buying program was about to start until the afternoon of the day before. No purchasing under the program occurred, so far as the record shows, until March 8th, the day the memorandum was written.[9a] The earliest date upon which *even the Government* claims that any action was taken as to the prices paid under the program is March 14th (B. 19).

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[9] McDowell, R. 1183, 1199; Sus. R. 1870.

[9a] Jacobi, R. 384; McDowell, R. 1199-1200.

Even more significant is the fact that the prices which were mentioned in the letter were not, as the Government suggests, prices in advance of the market. On the contrary, the price of 3⅝ on third grade was equal to the *lowest* quotations of both trade journals on that day and the price of 4⅝ on third grade was equal to the lowest quotations of one trade journal and to the average of the other.[10]

The second inference sought to be drawn—that the memorandum refers to a price which had been reached at a previous meeting—is affirmatively disproved by the record. The only natural inference to be drawn from this reference is that two refiners, whose relationship had previously been very friendly,[11] had discussed the probable trend of the market, and that this letter referred to that discussion. In any event, the affirmative testimony as to the discussion at previous meetings is detailed and conclusive.[12]

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As stated by the Government (B. 22), certain employees of the Skelly Company felt that their companies were "obligated" to take the distress gasoline which they had informally indicated to the Committee they would take,[13] and referred to the amount which the sub-committee asked Skelly to take as an "allocation" to it.[14]

The Government argues that these references in the Skelly letters to "quotas," "allocations" and "commitments" show clearly that there were definite agreements and commitments as to the quantities of gasoline which

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[10]Def. Ex. 1024, R. 3807.
[11]McDowell, R. 1197.
[12]See pp. 38-43, *supra*.
[13]See *e.g.*, Govt. Ex. 96, R. 2699.
[14]Govt. Ex. 124, R. 2722.

each company was to take. The respondents believe that the essential nature of the program would not in any respect be changed even if it were necessary to make formal commitments or allocations in order to deal with the problem of distress gasoline. However, in view of the emphasis which the Government has placed upon this (legally insignificant) point, it may be well to point out the following:

1. The Circuit Court of Appeals specifically held that the evidence "concerning allocation and obligation" was incompetent (R. 3944).

2. The most that the Circuit Court of Appeals could find in the record was "evidence to the effect that the committee recommended the amount which each company should purchase, and that the companies felt a moral obligation to comply therewith" (R. 3919) and that "There is evidence, rather indefinite and uncertain, that certain employees of the purchasing companies considered that allocations were being made along lines similar to those which had been made under the Code, and that the companies were obligated with respect to such allocations; but the record is far from convincing in this respect" (R. 3920). The Circuit Court specifically found that "The plan was a voluntary one and we find nothing in the record to indicate that anyone participating in the program was to be penalized for non-compliance therewith" (R. 3919), and that "The record discloses that the plan was voluntary, without coercion, and with no penalty imposed for non-compliance with the recommenda-

tions made by the Tank-Car Stabilization Committee" (R. 3924).

3. In point of fact the Skelly letters reflect the opinion of only one man, J. F. Nagle, an employee of Skelly. Of the 15 Skelly letters cited by the Government, four (Government Exhibits 101, 120, 122 and 124) were written by Nagle. Four others (Government Exhibits 93, 95, 96 and 98) are based upon letters from, or conversations with Nagle, and merely repeat the language which he had used.[15] The other seven were all written as a result of instructions which had been transmitted through Nagle.[16] Thus the only opinions reflected in these letters are the opinions of Nagle. He was formerly a defendant in this case. The trial court, however, directed a verdict of acquittal in his favor at the close of the evidence.

4. Nagle's own letters, upon which the Government relies, show that he believed that, regardless of any "allocations," "obligations" or "quotas," Skelly had the right to select the independent refiners from whom it would buy and to refuse to buy from any given refiner if it saw fit. The same letter[17] which stated that Skelly had refiners assigned to it contains the following language:

"Does United [Laboratories] prescribe any particular set of specifications, by which we might be guided in buying our outside third grade gasoline?

[15]Cf. Govt. Exs. 94, 101, R. 2697, 2702.
[16]See Govt. Ex. 102, R. 2703.
[17]Govt. Ex. 124, R. 2722.

> If they do, then, of course we can scout the market and find out who, among the small refiners whose surplus is moved through the committee's activities, makes a product meeting such specifications, and then tell the committee that we will take our monthly 'allocation' from them instead of from Wilcox, or Taxman, or Panhandle, or some of the other jacklegs whose stuff won't pass muster."

Similarly, on November 20, 1935, Nagle wrote L. H. Poland, the manager of Skelly's retail stocks department, complaining about the quality of a shipment of gasoline:

> "If * * * these outside refiners ship off-specification material, about the only thing we can do is refuse to take any of their stuff when the Buying Program Committee tells us they have to move some, or to turn the refiner down completely when and if he has the nerve to call us up and solicit some business after such an instance."[18]

The amounts actually taken by the various companies from month to month followed no fixed pattern, and were not in proportion to the size of the companies.[19]

As stated by the Government (B. 22) a number of the letters and inter-office memoranda in the record indicate that the purchases which were made in this way at times imposed some hardship on the major companies. The quality of the distress gasoline purchased did not always

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[18]Govt. Ex. 100, R. 2702.

[19]Govt. Exs. 747, 750, 751, R. 3270, 3276-9. Jacobi at one point testified that "the larger the company * * * the more gasoline they took" (Jacobi, R. 439). However, the Government's own exhibits showed that he was wrong.

come up to specifications,[20] and the independent refiners were at times careless about making deliveries.[21]

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It is evident from market letters and inter-office correspondence that the employees of certain of the companies realized the obvious fact that the removal of the competitive evil of distress gasoline removed also the depressing effect of such gasoline on market prices. Such letters also indicated that the market was responding normally to other economic factors such as the increase of consumption, the cutting off of hot oil, and the balancing of crude production and refining schedules in accordance with market demand.[22] None of them indicate that the purchasing had any other effect than that which was to be expected from the removal of the evil. Some of them affirmatively show that the market had an independent trend and that the buying merely removed the effect of distress gasoline on that trend.[23]

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During the period when the industry was operating under the Petroleum Code the expenses incurred by the members of the Mechanical Sub-Committee were charged to and paid for by the Planning and Coordination Committee of the Code of Fair Competition for the Petroleum Industry.[24]

On May 27, 1935 this Court held the enforcement provisions of the National Industrial Recovery Act unconsti-

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[20]See *e. g.*, Govt. Exs. 100, R. 2702; 124, R. 2722.
[21]Govt. Ex. 121, R. 2719.
[22]See pp. 68-70, *infra*.
[23]See, *e.g.*, Govt. Ex. 286, R. 2930.
[24]Jacobi, R. 463, cross, R. 472; McDowell, R. 1213; Def. Exs. 708, 903, R. 3138, 3505.

tutional in the *Schechter* case.[25] Shortly thereafter the members of the Tank-Car Stabilization Committee held a meeting to discuss their future course of action. The meeting concluded that it was important to attempt to preserve as much as possible of the constructive work undertaken under the Code.[26] This conclusion was reached in view of the expression of those in public authority that it was desirable to preserve the gains made by industry under the National Industrial Recovery Act.[27]

The activities of the Tank-Car Stabilization Committee were therefore continued until the spring of 1936. The attendance at meetings, however, gradually declined.[28] All activities were discontinued when it appeared that their propriety was being questioned by the Attorney General in grand jury proceedings.[29]

Prices Paid

Of the gasoline purchased by the respondents, 55% was purchased at the lowest prevailing quotation in the Chicago Journal of Commerce, and 35% was purchased below that quotation.[1]

As decided at the preliminary meetings of the Tank-Car Stabilization Committee, the purchasing companies were urged to pay the going market price as follows:

On March 14, 1935, the second meeting of the Mechanical Sub-Committee was held. Jacobi reported to the

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[25] *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); Arnott, R. 1706.

[26] McDowell, R. 1211-2.

[27] McDowell, R. 1208-9, 1212; Arnott, R. 1706-7; see Def. Exs. 899, 900, 901, R. 3497, 3499, 3503.

[28] McDowell, R. 1207-8.

[29] Jacobi, R. 396, 400.

[1] Def. Ex. 1025, R. 3809.

meeting that the independent refiners had complained that some of the major companies were attempting to purchase the distress gasoline disclosed by the surveys at prices greatly below th market.[1a] The Mechanical Sub-Committee discussed this and concluded that it was clearly contrary to the spirit of the program.[2] McDowell testified:

> "That provoked quite a discussion among us. I took the position that I thought that that was the wrong thing to do; that I didn't think that any one should try to chisel on these independent refiners. I said, however, that, after all, this plan didn't give the Sub-committee any authority to make prices, and that these deals had to be worked out between the buyers and the sellers. My position was that although I thought we should use such influence as we could, if we knew of any specific instance, to urge people to pay a fair going market price."

The members of the committee then discussed the market. From this discussion it appeared that on that day the market price for third grade gasoline was approximately 3¾ cents. The companies represented at the meeting had been paying that price for some days.[3] It was slightly below the lowest current gasoline quotation of the market journals on that day, and the market had already risen more than one-half cent since the Federal Tender Board had gone into operation.[4] The committee,

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[1a]Jacobi, R. 402, 407; McDowell, R. 1203.
[2]Jacobi, R. 402; McDowell, R. 1203.
[3]Jacobi, R. 409; McDowell, R. 1204; Govt. Ex. 682, R. 3112.
[4]Def. Ex. 1024, R. 3807.

however, decided that the market price would probably be about 3¾ cents during the following week.[5] Jacobi recommended to the companies with which he was in contact that they should pay that price in their purchases.[6]

From time to time during the spring of 1935 the question of what was the going market price continued to be discussed by the Mechanical Sub-Committee. Jacobi continued his practice of recommending to the companies which he contacted, namely, Shell, Sinclair, Globe, and Pure, that they pay what the Sub-Committee considered to be the going market price.[7] Jacobi himself invariably paid either the price which the committee thought represented the market price or one slightly thereunder.[8] Prices recommended by him, as indicated by his own purchases, were prices which were at the low or below the low of the market as already established by sales of independent refiners to jobbers.[9] During the spring of 1935, when these recommendations were being made, the market was rising. Prices recommended were based upon the prices already arrived at in sales by independent refiners to their jobber customers. Accordingly, as the market rose, the recommended prices followed it up. In all cases, however, they lagged behind the prices already being paid on the open market.[10] Jacobi testified that the companies to which he made these recommendations did not indicate whether or not they would pay the prices mentioned by

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[5]Govt. Ex. 682, R. 3112.
[6]Jacobi, R. 409, 410.
[7]Jacobi, R. 410, 413, 415, 431.
[8]Jacobi, cross, R. 479.
[9]Jacobi, cross, R. 479; Def. Ex. 712, R. 3173.
[10]*Ibid;* Def. Ex. 1024, R. 3807.

him. He was never advised what they did pay.[11] As a matter of fact, the prices actually paid to the independent refiners varied widely. At times three or four different prices were paid on the same day by the purchasing companies.[12] This was particularly true during the rise in the market when the prices paid by the respondents were lagging behind the market price. During the 67 business days when Jacobi was making price recommendations there were 55 days when more than one major company purchased on the same day. On 40 (or 72.7%) of those days they paid two or more different prices; on 9 they paid three or more different prices; and on one day they paid four different prices.[13]

The practice followed by the respondent McDowell, who was the chairman of the sub-committee, was somewhat different. He never recommended the payment of any price. If a prospective purchaser asked him, however, he would tell what price his own company was paying.[14]

The record does not disclose what the practice of Tuttle was.

The Government's brief contains the following statements:

> "When the majors advanced the price of crude oil in January, 1936, the Sub-Committee members, after discussing the price situation, recommended to the majors that they advanced their price for gasoline purchased under the program by ½¢ a gallon (R. 459-60)" (B. 20).

[11]Jacobi, R. 413, 415, cross, 490.
[12]See Def. Ex. 1024, R. 3807.
[13]Def. Exs. 874-7 inclusive, R. 3457-60; J. D. Miller, R. 1558-66.
[14]Evans, R. 527, 528, 529, 530; McDowell, R. 1204-5.

This statement requires explanation in two respects:

1. As shown above, the Government throughout its brief uses the word "majors" interchangeably to describe defendants named in the indictment and respondents in this Court.[15] The record shows that the companies which raised the price of crude oil in January, 1936, were neither defendants nor respondents. In the Mid-Continent the price was raised by the Standard Oil Company of New Jersey. In East Texas it was raised by the Sun Oil Company.[16] Neither of these companies is even mentioned in the indictment. There is not a scintilla of evidence to support the inference that the respondents by agreement raised this price.

2. There is no evidence in the record to show that "the Sub-Committee members" at this time recommended a corresponding advance in the price of gasoline purchased under the program. The *committee's* recommendations ended in May or June 1935.[17] The only price recommendation made in January, 1936, was made by Jacobi, acting independently and not by the Sub-Committee.[18]

A reading of the Government's brief (particularly page 20) would leave the impression that the respondents paid recommended prices higher than the price then being paid by jobbers and that such purchases led the market upward. Nothing could be farther from the truth. The actual fact was that the prices paid by respondents were at or, in a substantial proportion of cases, below the lowest

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[15]See note 1, p. 11, *supra*.
[16]Shatford, R. 1072.
[17]Jacobi, R. 410, 413, 415, 431.
[18]Jacobi, R. 459, cross, R. 488.

prices quoted by the trade journals as being paid by jobbers. The prices paid by respondents *lagged behind* the market rather than led it upward. Examination of Exhibit 1024[19] will dispose once and for all of any impression that it was the recommendation and payment by the respondents of prices higher than the market which accounted for the rise in spot market prices in 1935. For the convenience of the Court a copy of this exhibit is inserted at page 66. It reflects the results of an audit of:

(a) all spot purchases of gasoline made by respondents from independent refiners;

(b) all spot sales of gasoline made to jobbers by the independent refiners named in the indictment and by certain others.[20]

The exhibit compares these purchase and sales prices with the prices published in the journals.

Exhibit 1024 establishes:

(1) that the market journal quotations accurately reflected prices currently being paid by jobbers purchasing in the open spot market;

(2) that the prices paid by the respondents were generally *lower*, rather than higher than the prices being paid by jobbers currently purchasing on the spot market;

(3) that the prices paid by the respondents were not uniform, but varied widely among themselves;

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[19]R. 3807.

[20]J. D. Miller, R. 1652-4.

(4) that the market journals did not base their quotations upon the prices being paid by the respondent companies in purchasing from independent refiners; and

(5) that if, as alleged in the indictment, the market journals had published the prices being paid by the respondent companies, their quotations would have been lower and more irregular than they were.

Amounts purchased

The indictment alleges that the defendants participating in the Mid-Continent Buying Program purchased "nearly 50 per cent of all the gasoline sold" by the independent refiners in the Mid-Continent with whom they are alleged to have conspired.[1] The evidence shows that the respondents had purchased only 14.9 per cent of the gasoline of the independent refiners named in the indictment.[2]

Amounts manufactured by the independent refiners

The indictment alleges that "in furtherance of the conspiracy" the independent refiners in the Mid-Continent field "curtailed their production of gasoline."[3] The record not only contains no evidence to sustain this allegation,[4] but shows affirmatively that the production of the inde-

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[1]Indictment, Paragraph 23, R. 16.

[2]J. D. Miller, R. 1646, 1649. The figure 14.9% is obtained by subtracting from the amount purchased by the companies which were defendants when Miller testified, the amounts purchased by Standard of Indiana and Barnsdall, which subsequently were granted new trials. (See Def. Ex. 984, R. 3723; Evans, R. 523-6.)

[3]Indictment, Paragraph 23, R. 16.

[4]The Circuit Court of Appeals found that "there was no competent evidence in support of the charge" (R. 3944, see R. 3935-7).

pendent refiners named in the indictment increased in 1935 by 21% over 1934 and in 1936 by 11% over 1935.[5]

III. The Government's discussion of "The formation, nature and objectives of the East Texas buying program" (B. 23).

In its brief the Government states that the East Texas Buying Program "followed closely the pattern of the Mid-Continent Buying Program" (B. 24). The respondents do not believe that the facts sustain this conclusion. They believe that the so-called "East Texas Buying Program" was in reality a selling program conducted by the East Texas independent refiners. As the Circuit Court of Appeals stated:

> "We think it is fair to state * * * that this program was largely under the control of the Secretary of the East Texas Association, and that the program has more of the earmarks of a sellers' program by that Association than a buyers' program by the defendants" (R. 3921).

Inasmuch, however, as the argument of the Government is directed against the kind of a buying program which it claims was operated in the Mid-Continent, and since it assumes that the same principles of law are ap-

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[5]See Appendix A, pp. 136-8. In the Circuit Court of Appeals the Government sought to counteract this evidence by saying that the 1935 increase was the result of the removal of N.I.R.A. code production restrictions after the *Schechter* decision. The argument proves too much. The refinery provisions of the Code were administered with the idea of reducing runs in line with market demand. (See Def. Ex. 835, R. 3347.) If, after the Code, the independent refiners increased their runs by 21% while market demand increased by only 6%, it is obvious that there was no substantial curtailment, but rather a very substantial increase in the supply. (See J. D. Miller, R. 1617-9.)

plicable to both programs, it seems unnecessary to set forth in this brief the facts as to the respondents' purchases in East Texas. Those facts are fully reviewed, however, in Appendix A, at pages 143 to 184.

IV. The Government's discussion of "The Sus and Ruether reports of the February meetings of the Tank Car Stabilization Committee" (B. 25).

To avoid "the danger that it may fail to reproduce faithfully the spirit and objectives emanating those who formed the conspiracy," the Government sets forth in the fourth section of its Statement, excerpts from reports written by Ruether of Shell and Sus of Sinclair, describing, respectively, the meetings of the Tank Car Stabilization Committee on February 5th and February 11th, 1935.[1]

It should be noted that neither Ruether nor Sus ever played an active part in the Mid-Continent Buying Program. Ruether attended the meeting of February 5th as a guest of his superior, Van Eeghen. His company's representative on the Tank Car Committee was first Van Eeghen and later the respondent Lakin.[2] Sus attended the February 11th meeting as a special representative of Sinclair,[3] and his memorandum states on its face that "the writer had no knowledge and did not participate in this discussion."[4] Neither he nor any Sinclair representative ever attended the subsequent meetings of the committee.[5]

Ignoring these facts, however, and accepting the Government's contention that these memoranda represent

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[1]Govt. Exs. 177 and 376, R. 2733, 2977.
[2]McDowell, R. 1169, 1178, 1193; Arnott, R. 1696-7.
[3]McDowell, R. 1186.
[4]R. 2978.
[5]Jacobi, R. 398-9.

"faithfully the spirit and objective emanating those who formed the conspiracy," we find that the record shows the following:

As to the Ruether memorandum, the Government does not contend that it adds anything to the description of the Mid-Continent Buying Program set forth above, except in so far as it indicates that "the defendants' ultimate objective in raising Mid-Continent spot market prices was to bring about a corresponding rise in prices in the Mid-Western area" (B. 28). The first paragraph of the excerpt quoted in the Government's brief states merely that the price policy of Standard Oil Company (Indiana) was based upon the tank-car market. This fact is not in dispute. The undisputed evidence also shows that this policy was arrived at by Standard of Indiana acting independently.[6]

The second paragraph, quoted from the memorandum, states that "a stable retail market requires a higher tank-car market." It will be recalled that Arnott was appointed by the Secretary of the Interior to help stabilize retail price structures in the mid-western area.[6a] Before undertaking that work, he advised members of the P. A. B. that a stable retail price was dependent upon a stable tank-car market.[7] Those engaged in stabilization efforts expressed the opinion that the gains achieved in stabilizing the retail markets could not be maintained unless something were done about distress gasoline.[8]

The statements contained in the Ruether memorandum are, therefore, not only consistent with, but confirmatory of what has been set out heretofore.

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[6]Marshall, R. 1235-6; cross, R. 1252.

[6a]See pp. 34-5, *supra*.

[7]Arnott, redirect, R. 1796-8.

[8]Arnott, redirect, R. 1796-8.

The Sus memorandum (Government Exhibit 376) is a description of the discussion at the meeting of February 11th. The memorandum states that the buying program was designed to deal with "distress" or "surplus" gasoline; that such gasoline was mainly in the hands of only fifteen refiners; that it amounted to only about 600 cars a month or roughly two per cent of the major's runs; that each major was merely to buy from an independent whose distress gasoline "*it could advantageously move*"; that the buying would involve "no great burden * * * upon anyone"; that the guidance and control of prices was limited to the buying prices of the majors (in order as Sus put it "to see to it that these major refiners played fair with these smaller independent refiners who were in economic distress, * * *").[9] In all of these matters the memorandum simply corroborates the evidence described above. It is thus entitled to interest, if not necessarily to the prominence given it by the Government.

The memorandum contains the statement that "a steering committee would guide and control, periodically, the prices to be paid for this gasoline by the major company to the small refiner." The Government assumes (B. 26-7) that this language shows that the purpose of the buying program was to control and fix market prices. The meaning of these words is clear. Mr. Sus, who wrote the memorandum, testified as to just what was said at the meeting with reference to this question. He said:

> "There was a considerable amount of discussion as to a steering committee and the functions it would perform. One of the recommendations of this tank-car stabilization committee was that there should be

[9] Sus, R. 1870.

appointed a steering committee. The function of this steering committee was to keep itself currently informed as to who had gasoline to sell,—who had distress gasoline, and who, on the other hand, wanted to buy gasoline, in order that there might be an agency which would bring the buyer and the seller together.

"This steering committee was also to keep itself informed as to the price at which gasoline was currently moving. And they were to see to it and to use such persuasion and such influence as lay in their command, to see to it that these major buying refiners did not take advantage of these smaller selling refiners, and by reason of the economic distress of these smaller refiners, bid down the price to below the current levels at which gasoline was selling, because to do so would have defeated the very purpose of the meeting, which was to stabilize. And this steering committee was to see to it that these major refiners played fair with these smaller refiners who were in economic distress, and didn't chisel under the going market, on the price at which they bought this gasoline. The only reference that was made at the meeting to the price to be paid was that they wanted these refiners who bought gasoline from these refiners who had the distress gasoline, to pay the going market price and not chisel." (R. 1870.)

"No recommendation or suggestion was made, that this steering committee should fix the price at which gasoline should be purchased by these companies. No recommendation or suggestion was made, that the committee should recommend the price to be paid from time to time." (R. 1871.)

The respondent Robert W. McDowell, the Chairman of the Tank-Car Stablization Committee, presided at the

meeting to which Mr. Sus referred. He also testified in this case. His testimony is as follows:

> "Something was said at this meeting of February 11th about the prices at which purchases should be made. That question was raised several times in the general discussion and by different people, and Mr. Ashton always answered the question by stating that this plan was not a price-fixing plan; there was no basis for the setting of any price; but the plan would suggest that the buying companies be willing to pay a fair going market price for such purchases as they did make." (R. 1188.)

The record clearly discloses the understanding reached at the meetings which considered the Mid-Continent buying program. Five witnesses testified as to the nature of this program.[10] All agreed that it was a program to purchase distress gasoline at the going market price. This record also shows what actually happened under that program. The actual recommendations made to the purchasing companies by Jacobi (a member of the sub-committee) were based on the going market price. The prices paid by the purchasing company were in general at or below the going market price.[11]

The Circuit Court of Appeals considered the testimony as to the agreement reached at these meetings and described it as follows:

> "• • • The Stabilization Committee had three meetings—one on February 5th in Chicago, another on February 11th in Chicago, and the third on

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[10] Jacobi, R. 362-504; Evans, R. 515-55; McDowell, R. 1167-1228; Arnott, R. 1689-1708; Sus, R. 1866-74.

[11] See pp. 52-8, *supra*.

March 5th in St. Louis, Missouri. Without going into detail as to what took place at these meetings, we think the substance of what was accomplished and agreed upon was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices. * * * A mechanical sub-committee consisting of one Jacobi, the appellant McDowell, and the defendant Tuttle, was appointed to assist in the disposal of surplus gasoline not anticipated by the monthly surveys. It was also a part of the function of this sub-committee to urge companies to pay the fair going market price. The plan was a voluntary one and we find nothing in the record to indicate that anyone participating in the program was to be penalized for non-compliance therewith * * *." (R. 3919.)

V. THE GOVERNMENT'S DISCUSSION OF "THE EFFECT OF THE BUYING PROGRAM ON MID-CONTINENT SPOT MARKET PRICES AND PRICES IN THE MID-WESTERN AREA" (B. 29).

In this section of its brief, the Government argues that the behavior of "Mid-Continent spot market prices" shows that those prices were fixed and controlled by the respondents. The respondents believe that a review of all pertinent evidence will clearly show that the behavior of the spot market prices during the period in question is consistent only with the operation of competition in the absence of distress gasoline and that, therefore, no inference that the respondents fixed or controlled that price is supported by the record.

It will be recalled that in its discussion of the indictment, the Government ignores the allegations that the market journals had fraudulently published the prices arti-

ficially fixed by the defendants and had misrepresented such prices as the spot market prices. Elsewhere in its brief, it argues that the real charge in the indictment is that the respondents controlled and fixed not the published prices, but the actual spot market prices paid in the spot market (B. 143-4).

In view of this claim as to the meaning of the indictment, it is somewhat surprising to find that when the Government comes to the effect of the buying program on Mid-Continent spot market prices it refers not to the actual prices paid in the spot market, which are clearly disclosed by Defendants' Exhibit 1024, but to Defendants' Exhibits 679 and 680, for identification, which reflect merely the market journal quotations. The Government explains the use of these particular charts on the ground that "the omission therefrom of additional data makes it easier to observe the price trend" (B. 29). The "additional data," which the Government prefers to omit, consists of the actual prices paid by jobbers and consumers purchasing on the spot market. For the convenience of the Court, we set out Defendants' Exhibit 1024 at this point so that the Court may study the prices actually paid.[1] We shall confine our discussion to these prices.

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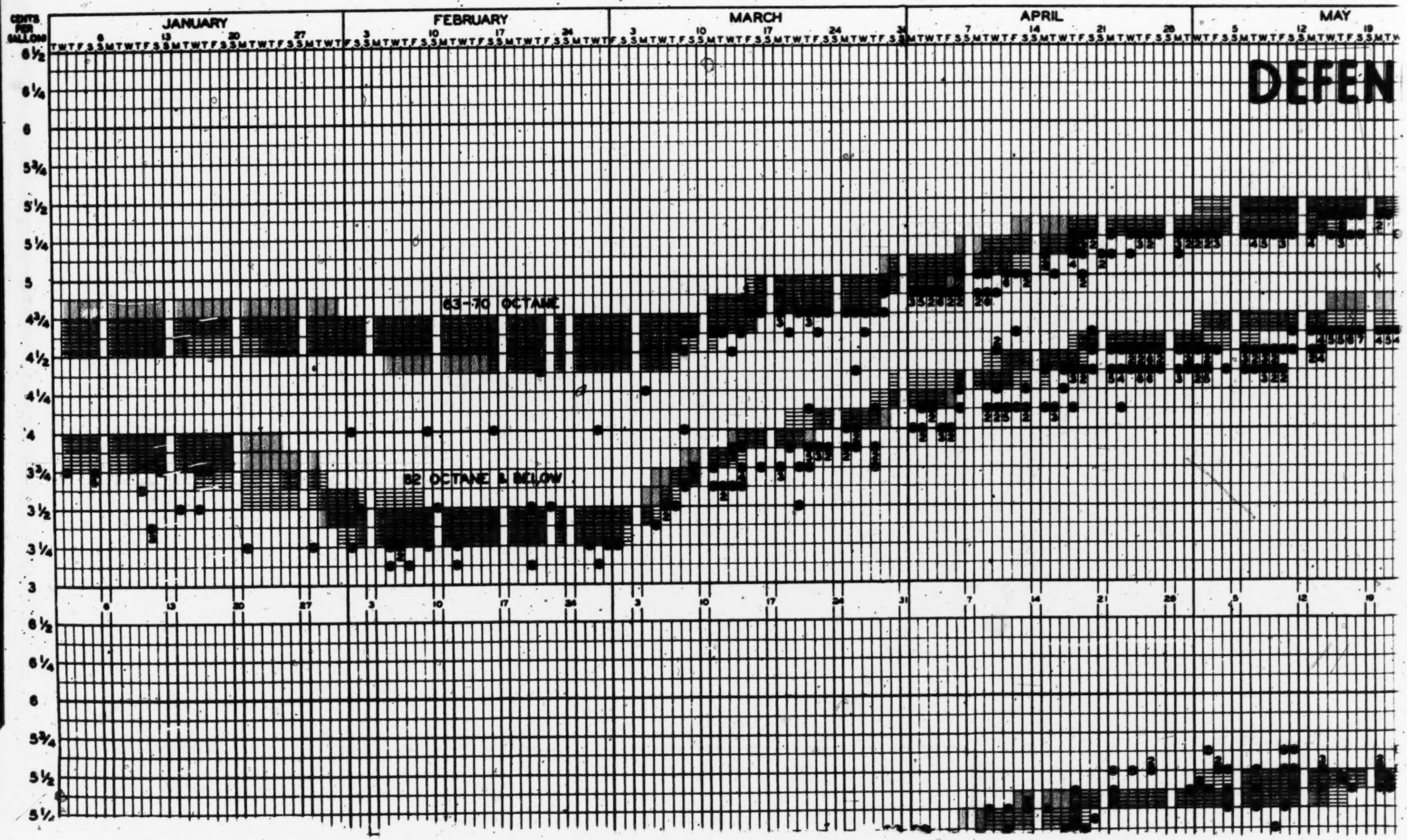
[1]The prices actually paid on the spot tank-car market appear in the form of black, green and blue dots on the lower section of this chart, entitled "Jobbers & Consumers." The position of the dots indicates the prices paid on the date given. The figures under the dots indicate the number of shipments made at the price in question by the refiners covered by the audit. The pink and cross-hatched areas indicate the range of prices quoted currently in Platt's Oilgram and the Chicago Journal of Commerce, respectively.

As appears from this charf, prices paid by jobbers and consumers on the spot tank-car market exhibited much wider variations than would appear from the quotations in the market journals, particularly during the latter part of 1935.

PURCHASES OF REGULAR & THIRD GRADE GA

PLATT'S OILGRAM

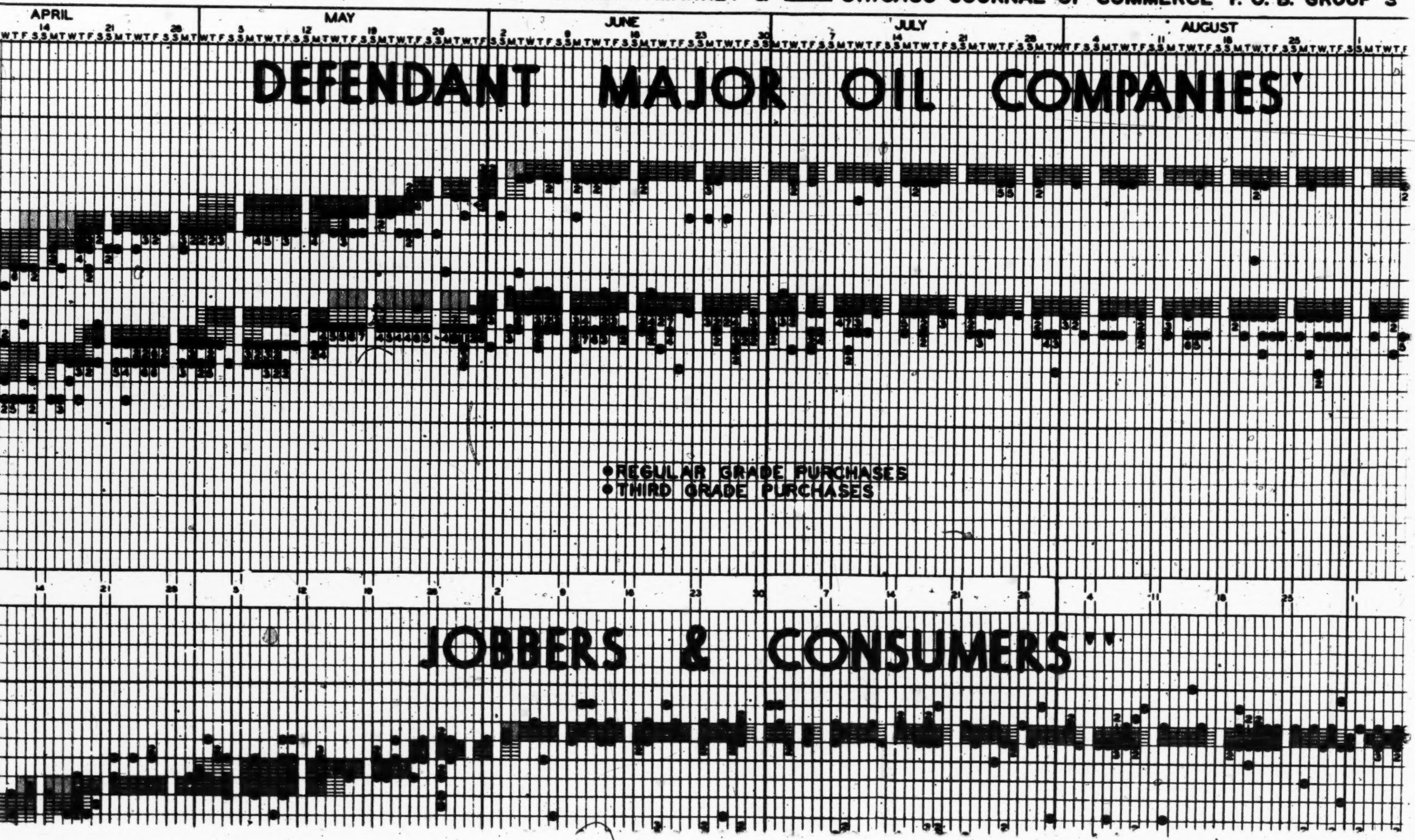


EGULAR & THIRD GRADE GASOLINE ON A FLAT PRICE OPEN MARKET BASIS F. O. B. GROUP 3

COMPARED WITH

COMPOSITE OF 1935 PRICE QUOTATIONS

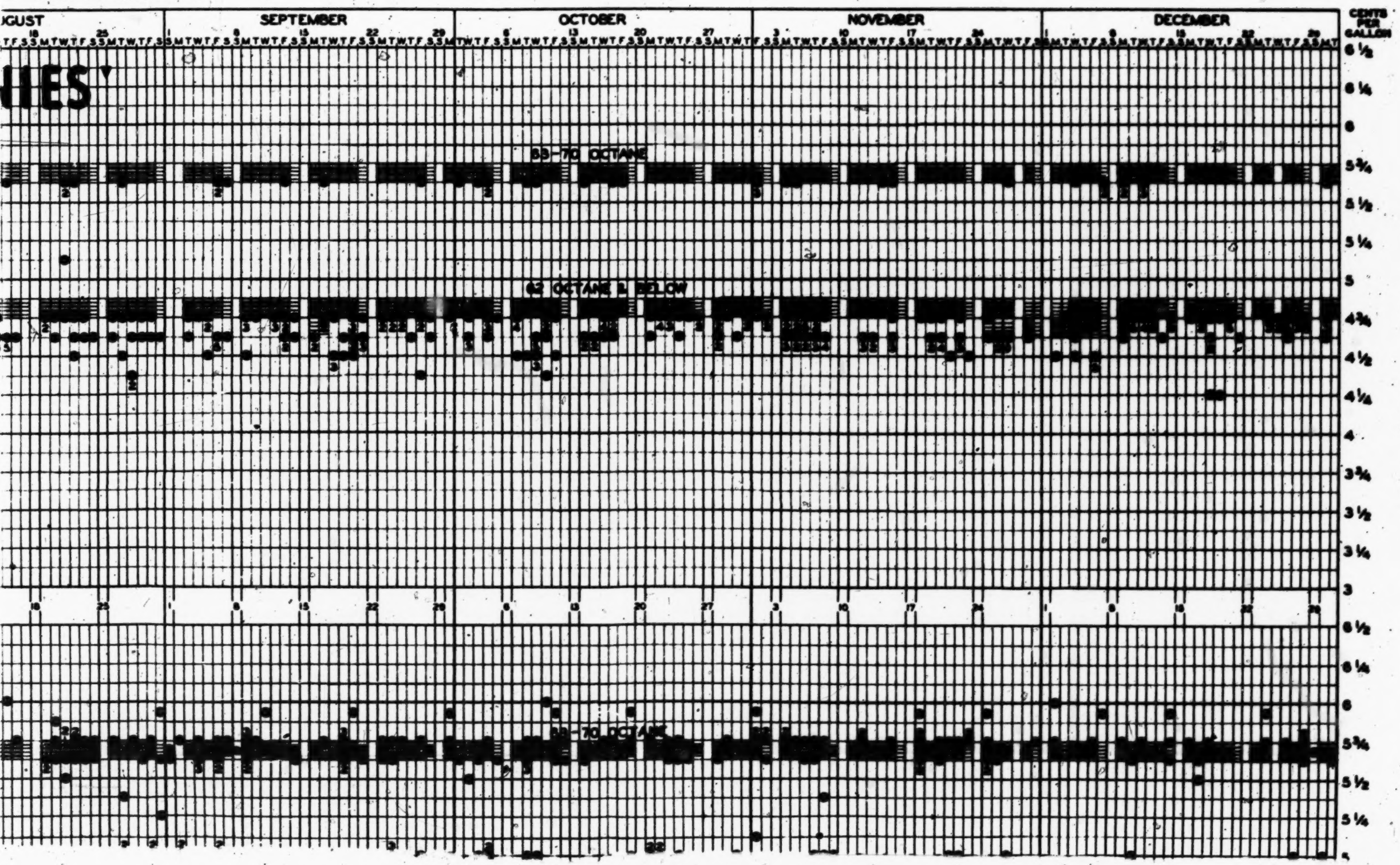
PLATT'S OILGRAM OKLAHOMA REFINERY MARKET & CHICAGO JOURNAL OF COMMERCE F. O. B. GROUP 3

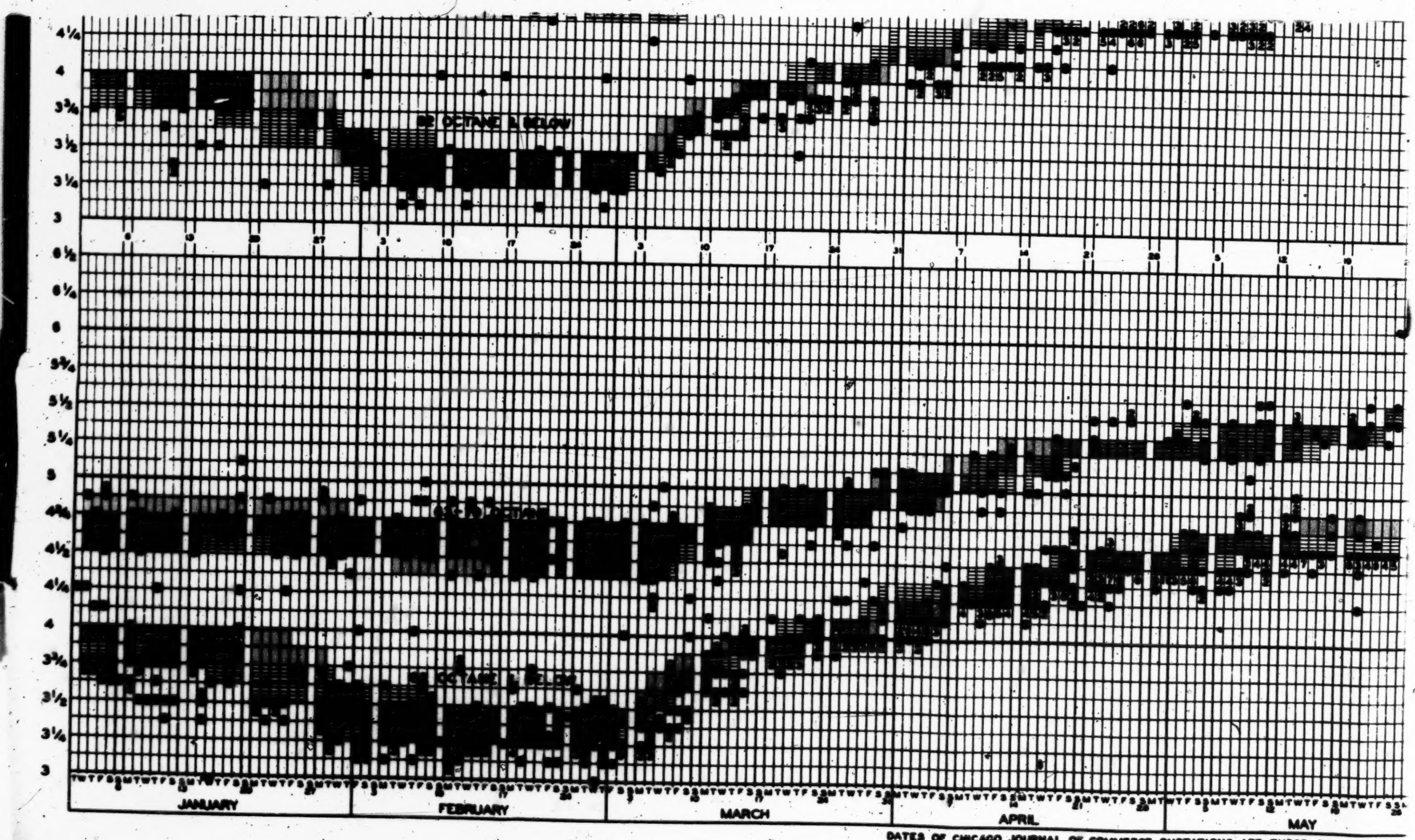


O. B. GROUP 3 OKLAHOMA REFINERIES

EXHIBIT NO. 1024

E F. O. B. GROUP 3

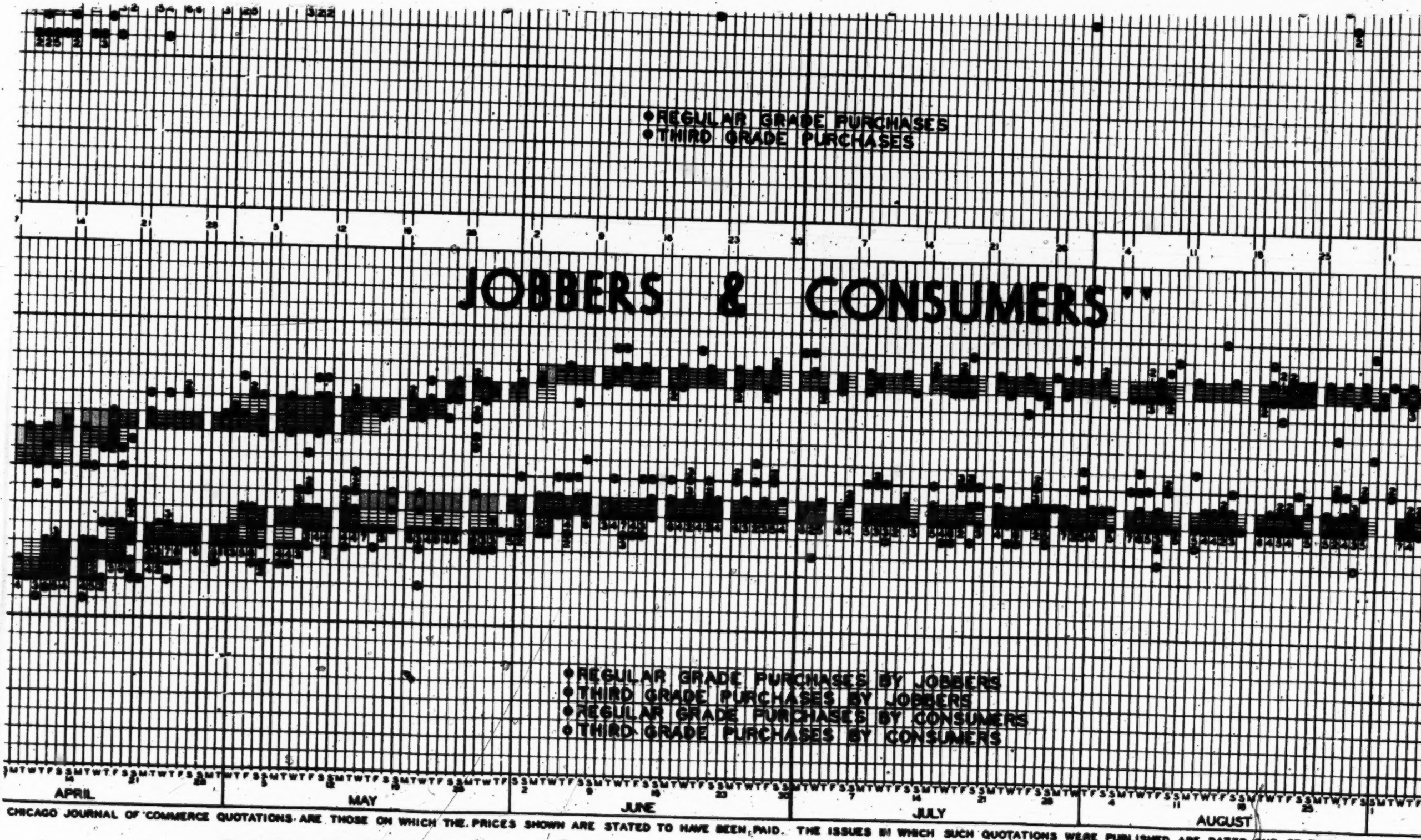




DATES OF CHICAGO JOURNAL OF COMMERCE QUOTATIONS ARE THOSE ON WHICH THE

▼ PURCHASES BY DEFEND

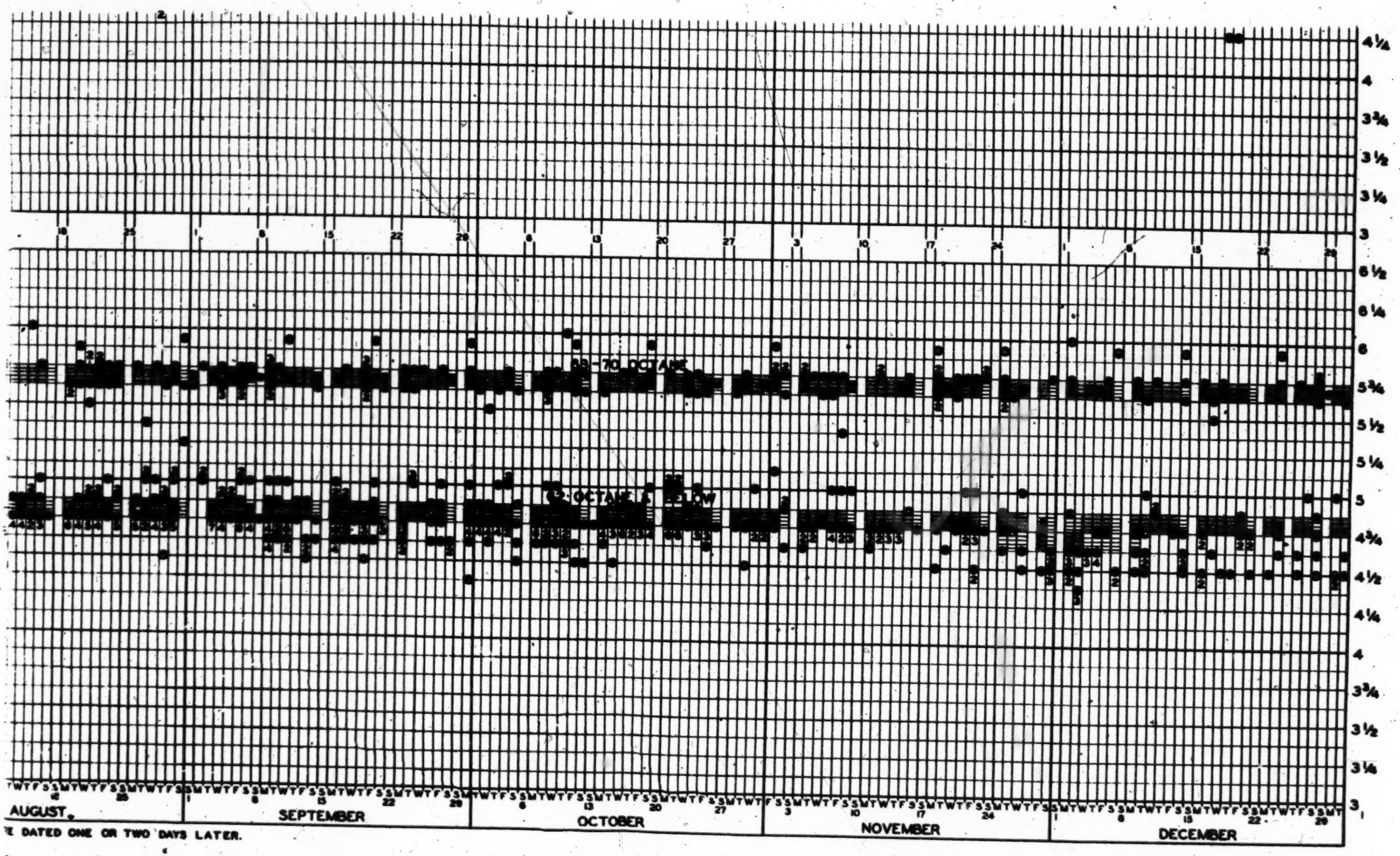
▼▼ PURCHASES BY JOBBER



CHICAGO JOURNAL OF COMMERCE QUOTATIONS ARE THOSE ON WHICH THE PRICES SHOWN ARE STATED TO HAVE BEEN PAID. THE ISSUES IN WHICH SUCH QUOTATIONS WERE PUBLISHED ARE DATED ONE OR TWO DAYS LATER

▼ PURCHASES BY DEFENDANT MAJOR OIL COMPANIES ARE FROM INDEPENDENT REFINERS & BROKERS

▼▼ PURCHASES BY JOBBERS & CONSUMERS ARE FROM INDEPENDENT REFINERS & MAJOR OIL COMPANIES



E DATED ONE OR TWO DAYS LATER.

S

NIES

[redacted]

The Government says (B. 30):

> "The Circuit Court of Appeals recognized that the spectacular rise in prices in the first part of 1935 and the unprecedented price rigidity thereafter constituted, on its face, 'rather convincing' circumstantial evidence that the defendants had the power to control and did control spot market prices (R. 3933)."

The Government, however, omits to quote the full sentence. What the Circuit Court of Appeals really said is:

> "* * * On its face, this is a rather convincing circumstance, but when considered in connection with other circumstances, it is not so convincing and certainly not conclusive."

We propose to examine these "other circumstances."

The upper part of the chart, entitled "Defendant Major Oil Companies," shows in green and black dots the prices paid by the respondents in purchases from independent refiners and the number of shipments made at each price. This part of the chart was originally introduced to disprove the allegations of the indictment that the respondents had paid higher prices than those being paid by the consumers and jobbers on the spot tank-car market, and that the market journals had fraudulently published those prices. As appears from the chart, these allegations were entirely untrue. The respondents' purchases were generally made at or below the lowest quotations in the market journals, and below the prices currently being paid by jobbers and consumers. If the market journals had attempted to reflect the prices paid by the respondents their quotations would have been lower than they actually were.

A. According to the undisputed evidence, and the concessions of the Government itself, the price rise in the spring of 1935 was due to a number of factors, of which the buying program was only one.

There is no dispute as to the causes of the price rise in the spring of 1935. The Secretary of the Interior summarized the matter in his Annual Report to the President, submitted to Congress in December, 1935,[1] as follows:

> "The operations of the Tender Board, of the production provisions of the code and refinery amendment, and of the stabilization committee of the planning and coordination committee with the cooperation of the Petroleum Administrative Board, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935 * * *."

Many witnesses, both for the Government and for the respondents, agreed with the Secretary of the Interior that major company buying had had an effect on the price of gasoline in 1935 and 1936.[2] A number of the respondents and their agents had also written letters showing that they believed that the major company buying, either generally throughout the year, or in specific instances had been a factor in removing the effect of distress gasoline on market prices. Both the witnesses, and the writers of these letters, however, far from admitting that the removal of distress gasoline was solely responsible for the behavior of market prices, repeatedly commented on the

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[1] Def. Ex. 917, R. 3522, 3525.

[2] Lanzer, R. 262; Bradshaw, R. 687, 694, 695, 699, 700; Steiger, R. 752-3, 754; Franklin, R. 989; Shatford, R. 1065, 1068; cross, R. 1103, 1105; Van Covern, R. 1512.

market effect of various economic factors, such as hot oil, refinery allocations, increase in consumption, and crude production control which continued to play their part.[3]

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[3]The Government's quotations from these exhibits found in the footnotes on pages 31 and 32 of its brief, of course, leave out these other factors. However, the very exhibits mentioned refer repeatedly to such matters as

"* * * increase in seasonal consumption has given hope of a satisfactory market in the next few months." (Govt. Ex. 251, R. 2846.)

"Refiners in all districts reported a brisk wave of shipping instructions on gasoline * * *.

"Improved conditions in East Texas the last few days have been noticeable, as less illegally produced gasoline is being offered." (Govt. Ex. 253, R. 2852.)

"Retail market demand is expected to increase materially in several middle western states where the Government has appropriated large sums of money for farm erosion work. This should help to strengthen tank car gasoline and kerosene prices." (Govt. Ex. 254, R. 2855.)

In the same exhibit the tendency of "allocation of refinery crude runs" to improve prices is commented on.

"Refiners' conservative schedules of operation are considered of great importance for today's market. (Govt. Ex. 275, R. 2903.)

"Manufacturers in general have realized in the last few months the importance of unselfish practices for the good of the industry. Refiners, large and small, have continued to contribute this week toward the firmness of the present market by endeavoring to hold their gasoline production in line with seasonal market demands." (Govt. Ex. 277, R. 2909.)

"The industry seems to have taken heart in the renewed activities of the Federal Board in East Texas and most of the credit for this better state of mind must be given to the Federal Board." (Govt. Ex. 682, R. 3112.)

"The prospective outlook broadened this week toward improvement of the gasoline market in the Mid-Continent territory, due to an advance in crude oil prices." (Exhibit 285, R. 2927.)

The whole matter is best summed up as follows by Government's Exhibit 257 (R. 2861):

Government counsel conceded this in their closing arguments to the jury, saying:

> "The Connally Act * * * was effective in shutting off hot oil, * * * and to the extent that it reduced that supply of hot oil of course it had its effect, a legal effect, a proper effect on price; and I would not be blind enough to say there were not other forces.
>
> "We were coming out of a depression; there was greater seasonal demand, * * * and I would not stand here and say for one minute, gentlemen, that the refinery allocations that were put into effect in 1934 as the result of the refinery amendment to the code * * * did not have its effect also on the raise in the tank car price." (R. 2063, 2064.)

One further fact remains to be noted: no witness attempted to assess the relative importance of these factors. The most that the direct testimony proves is that the respondents' buying was *a* factor.

"Refiners and marketers in general appear to be in accord in their view of the present market being established on a firm foundation, or at least considerably more so than at any time in the past many months. These thoughts are expressed in view of the prevailing conditions of the crude production end of the industry, the control movement of so-called 'hot oil,' and the products manufactured from same, and also the present basis of refinery operations, as all of these factors hold important places in the making of the market.

"In addition to the above mentioned favorable market factors, observers also point out we are now entering the heavier gasoline consuming season, which should materially help to further strengthen the tank car price structure."

Observe that this Government exhibit sets forth some of the main price factors which the respondents have already shown to have been acting on the market.

B. The fact that the rise in price in the Mid-Western area was less than the price rise in other parts of the country indicates that the respondents' buying activities were a relatively minor factor.

The Government contends that prices in the Mid-Western area were absolutely fixed and controlled by the respondents' activities. As the Government itself brought out on cross-examination, however, retail prices in the Mid-Western area rose less in 1935 than prices outside the area. Between March 1 and June 1, 1935, retail prices in 10 cities within the Mid-Western area rose only 72 one-hundredths of a cent. In 40 cities outside the area they rose 74 one-hundredths of a cent during the same period.[1]

A comparison of the average retail price of gasoline in 20 to 30 representative cities in the Mid-Western area and the average retail price in a hundred-odd cities outside the area,[2] reveals that the retail price of gasoline was lower in the Mid-Western area than it was in the rest of the country, throughout the indictment period. In all but four weeks in 1935 and in all but seven weeks in 1936 the Mid-Western area retail price was lower than the price outside the area. In 1934, on the other hand, the Mid-Western area price was higher during fourteen weeks and the same during one week. In other words, in 1934, the Mid-Western area price was higher than the rest of the country 26.1% of the time, while in 1935 it was the same or higher only 7.6% of the time and in 1936 only 13.4% of the time.[3]

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[1]Swensrud, cross, R. 1462.
[2]J. D. Miller, redirect, R. 1629.
[3]Def. Ex. 1013, R. 3791; J. D. Miller R. 1625-9.

For the convenience of the Court we set out at this point in this brief a copy of Defendants' Exhibit 1013, a chart which compares the course of retail prices in some thirty representative cities inside the Mid-Western area with the course of retail prices in some 120 cities outside the area.

C. There was no correlation between the respondents' activities and the behavior of prices during this period.

The 1935 price rise commenced on March 2, 1935, *a week before the Mid-Continent Buying Program had started.* During that week the market registered a ⅜c gain.[1]

The price rise coincided almost exactly, however, with the installation of the new Federal Tender Board in the East Texas field under the Connally Act, and the issuance of the first Federal Tenders thereunder.[2]

[*The respondents offered to show* that a similar price rise occurred in October, 1934, when the first Federal Tender Board (under Section 9[c] of the N.I.R.A., later held unconstitutional) went into operation. The excluded evidence would have shown that between October 17 and November 9, 1934 the quotations for third grade gasoline rose from 2⅞-3¼c and 2½-3c to 4⅛-4¼c and 4-4¼c, almost exactly paralleling the rise which took place after March 2, 1935 when the second Federal Tender Board went into operation.[3]]

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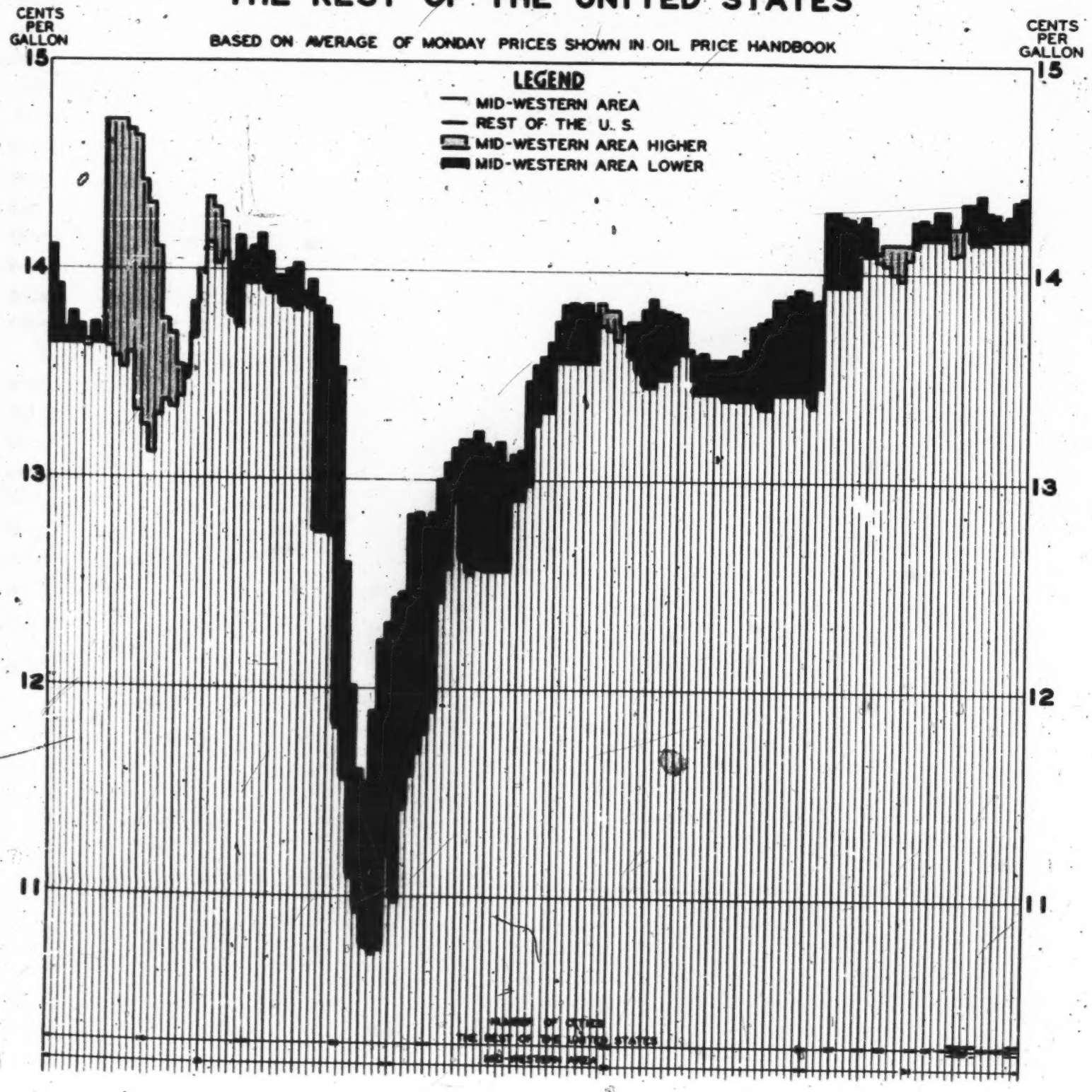
[1]Def. Ex. 712, R. 3173; Cf. McDowell R. 1201. If mere purchasing be considered without regard to the existence of a program, it might be noted that substantial purchases had occurred in January and February when prices were depressed. (J. D. Miller, R. 1635, 1636.)

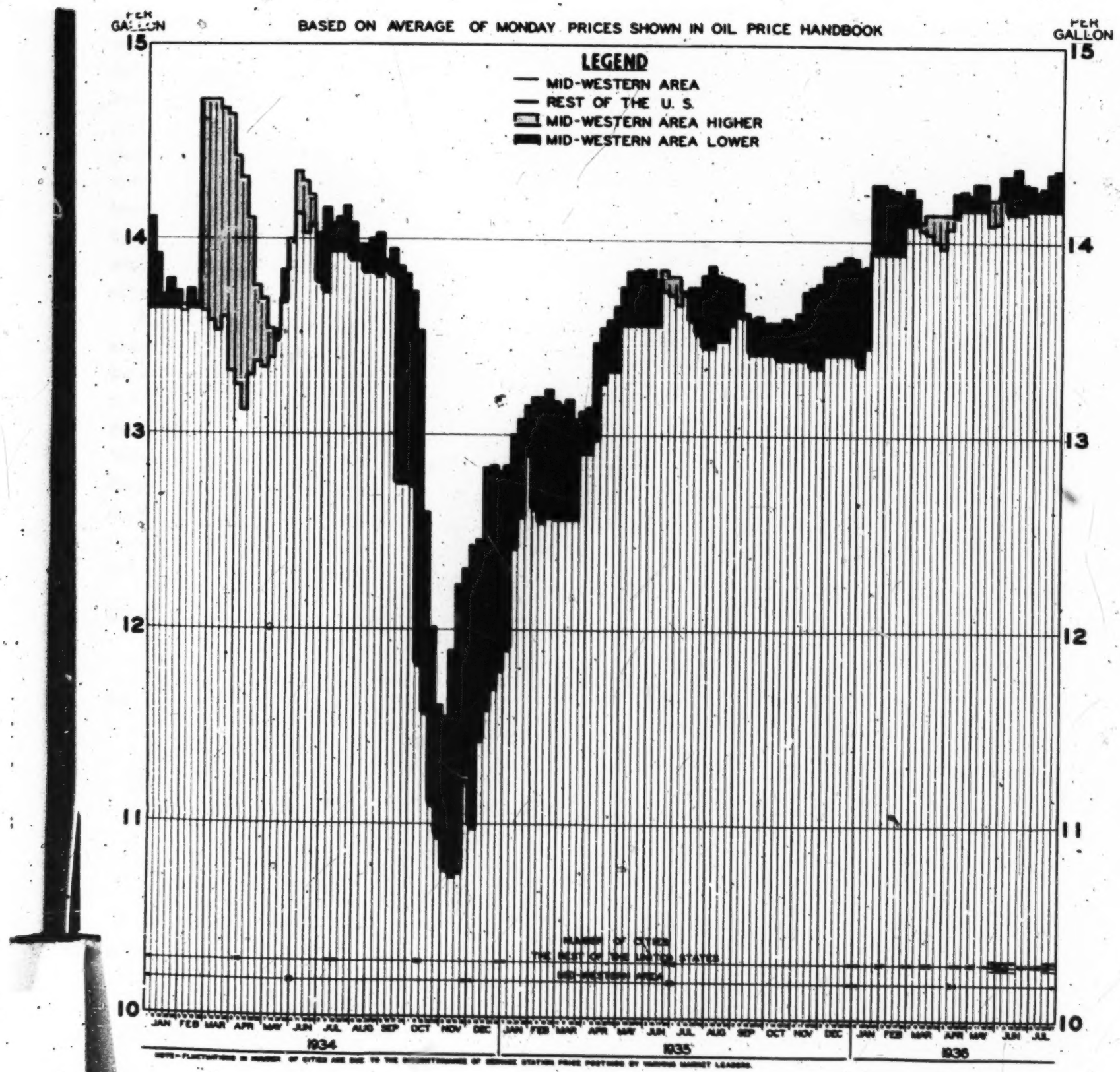
[2]Van Covern, R. 1512.

[3]Def. Ex. 849 for identification, R. 3389; Def. Ex. 868, R. 3433; Shatford offer, R. 1061-2; Van Covern offer, R. 1498-500.

EXHIBIT NO. 1013

SERVICE STATION PRICES (EX TAXES)
MID-WESTERN AREA
COMPARED WITH
THE REST OF THE UNITED STATES




PER GALLON
BASED ON AVERAGE OF MONDAY PRICES SHOWN IN OIL PRICE HANDBOOK
PER GALLON
LEGEND
MID-WESTERN AREA
REST OF THE U. S.
MID-WESTERN AREA HIGHER
MID-WESTERN AREA LOWER
15
14
13
12
11
10
NUMBER OF CITIES
THE REST OF THE UNITED STATES
MID-WESTERN AREA
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
1934
JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC
1935
JAN FEB MAR APR MAY JUN JUL
1936

There was absolutely no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the tank-car market. Major company purchasing was lightest during March, April, and May, 1935, when the market was rising. It was heaviest in May, June, July, August and September, 1936, during which period the price declined ½c. The volume of major company buying in 1936 when the prices were going down was approximately 53% higher than the volume of buying in the spring of 1935 when prices were going up.[4] On the other hand, in October and November of 1936 prices rose ¼c although major company purchasing decreased 38% in volume.[5]

Major company purchasing did not cease with the abandonment of the "program" in April, 1936. Purchasing during the last eight months of 1936 was 27% heavier than during the 14 months of the indictment period. The great bulk of this occurred during the five months from May through September when the price was going down. Major company purchases averaged 650 cars a month more during May, June, July, August and September, 1936, when the market was going down, than they did in March, April, and May, 1935, when the market was going up.[6]

D. The price was not "frozen" at a rigid level from June to December, 1935.

It is true that the *market journal quotations* (which reflect only the journals' opinions as to the range of prices

[4]Govt. Ex. 747, R. 3270.
[5]Beroth, R. 196.
[6]J. D. Miller, R. 1641.

at which the bulk of the gasoline was being sold) maintained an almost uniform level throughout the last half of 1935. *The prices actually paid,* however, displayed no such uniformity. Defendants' Exhibit 1024 (p. 66, *supra*), portrays the results of an audit of such prices. It shows that the prices being paid on the spot market varied from 4⅜c to 5⅛c for third grade gasoline and from 5¼c to 6c for regular. The Government's own broker and jobber witnesses repeatedly testified that substantial quantities of gasoline which was of as good quality as that being sold at prices quoted in the journals were available in 1935 and 1936 at prices below the trade journal lows.[7] As shown by Defendants' Exhibit 1013 (p. 72, *supra*) there were also substantial fluctuations in retail prices.

E. Under the conditions which existed during the indictdictment period stability in the market was to be expected.

The undisputed evidence showed that every *normal factor* which was brought to bear upon the tank car market during this period tended either to hold it level or to make it go higher.[1] Among those factors were the following:

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[7]Peterson, 299-304; Beroth, 191; Lanzer, 247, 272. "The matter of specifications, however, would not enter into whether we asked the low or above the low or below the low of the Journal."

[1]The Government claims (B. 20, 29) that prices during the indictment period displayed a rigidity which was without parallel in the history of the industry. Its witnesses testified that there had been much greater fluctuation in prior years and that it was most unusual for prices to be so stable as they were in the last half of 1935. (Beroth, R. 193, 194; cross, R. 222-3; Lanzer, R. 38; Breuch, R. 281-2.) The respondents objected to this testimony on the ground that conditions in the periods contrasted were not shown and no

(1) The price of crude oil remained constant at one dollar a barrel.[2]

(2) Because of the Connally Act, it was impossible to obtain illegal crude oil at a lower price.

(3) The Bureau of Mines made monthly estimates of the national demand for gasoline. On the basis of these estimates, it made recommendations to the several states as to the amount of crude oil which each should produce. These recommendations were generally accepted by the states and enforced under their proration laws in accordance with the provisions of an interstate compact approved by Congress.[3] This meant that when demand was great, as in the summer, the production of crude oil was increased and when the demand was small, as in the winter, production was reduced.[4]

(4) The period was marked by a great, consistently maintained and, indeed, record-breaking increase in demand, both in the Mid-Western area and in the country in general, substantially exceeding

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standard of comparison had been established. Not only did the court overrule such objections, but it refused to permit counsel for the respondents to demonstrate on cross-examination that the factors existing in prior years were different from those which existed during the period of so-called price rigidity. This action of the trial court is assigned as Error No. 74. (R. 2575.) When the respondents presented their case, they demonstrated, as shown above, that conditions in the latter part of 1935 could *not* be compared with conditions in prior years.

[2]Van Covern, R. 1513, Def. Exs. 593, 594, R. 3649, 3653.

[3]Franklin, R. 989; Van Covern, R. 1513.

[4]Franklin, R. 989.

the Bureau of Mines estimates upon which production allowables were based.[5]

Two witnesses for the respondents, John E. Shatford and Fred Van Covern, discussed this situation. Their uncontradicted testimony at pages 1070-2, 1476, and 1513-4 of the record shows that the factors affecting supply and demand had reached such a state of balance during this period that a relatively stable price would be the natural result in a normal competitive market.[6]

F. There is no evidence that the respondents' activities removed from 20 to 30% of the normal supply of gasoline on the spot market.

One other contention of the Government demands attention. On page 31 of its brief, the Government states that:

> "The buying program removed 20% to 30% of the gasoline which would otherwise be offered for sale on the Mid-Continent spot market and removed from one-third to one-half of the amount which would otherwise be sold on that market by the independent refiners whose offerings were most likely to depress spot market price (*infra*, note 60, pp. 47-48). Such a substantial contraction in supply, particularly when undertaken for the purpose of raising and maintaining prices, could be expected to achieve this result" (B. 31).

In the first place, the statement just quoted suggests that the respondents' purchases created a shortage of gaso-

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[5]Lanzer, redirect, R. 261; J. D. Miller, R. 1670; Van Covern, R. 1512-3; Def. Exs. 953, 954, R. 3649, 3653.

[6]For a more extended discussion of the factors at work during this period see Appendix A, pp. 242-59.

line on the market which may have prevented brokers and jobbers from obtaining supplies. The record, however, contains no evidence that any jobber or broker was ever unable to obtain supplies.[1]

In the second place, it is not true that the respondents "removed twenty to thirty percent of the gasoline which would otherwise be offered for sale on the Mid-Continent spot market." As shown above[2] the respondents purchased only 14.9% of the gasoline produced and the gasoline sold by the 14 independent refiners named in the indictment. As shown in Appendix A, there is no evidence in this record to indicate that the respondents removed more than 14.9% of the gasoline which these independent refiners sold on the spot tank-car market. The evidence on which the Government relies to establish this proposition —the testimony of Beroth at R. 189—deals with the amount of gasoline *consumed in the Mid-Western area* which is sold on the spot market. Furthermore, the Government's *entire* calculations are based on the obviously erroneous assumption that 14 refiners owning only 32.2% or 29 refiners owning only 78.3% of the refining capacity in the Mid-Continent fields sold 100% of the gasoline sold on the Mid-Continent spot market. Even if Beroth's testimony had purported to show the total amount of gasoline sold on the Mid-Continent spot market, therefore,

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[1]In another connection the Government points to four items of evidence which it claims proves the contrary—(Govt. Exs. 256, 274 and 275, and the testimony of Carl O. Beroth, R. 197-204, B. 44). As shown at pages 223-4 of Appendix A, none of these items of evidence supports the proposition for which it is cited.

[2]See p. 58, *supra*.

the respondents could only be said to have purchased from 14.9% to 22.7% of that total.[3]

Leaving all this aside, however, it is plainly impossible to argue in the face of this record that the Mid-Continent Buying Program resulted in any substantial curtailment of the spot market supply. As the following summary of the record evidence shows, the respondents would have purchased substantial quantities of gasoline regardless of whether there was a buying program.

(1) In 1935 and 1936, as in prior years, the refinery capacity of a number of the respondent companies was insufficient to meet the demand for their product. Pure, for example, although running its refineries in excess of their rated capacity, had to resort to purchasing both from the Gulf Company, Standard of Louisiana and Standard of Ohio and from independent refiners in order to meet its sales requirements.[4] The situation of Sinclair in 1935 and 1936 was the same as in prior years in that it was faced with a steadily rising demand which its own refineries were quite unable to satisfy. Its sales exceeded its manufacture by about 73,000,000 gallons in 1935 and by 173,000,000 in 1936.[5] Skelly's sales had exceeded its production every year since 1931. In 1935 and 1936 the

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[3]See Appendix A, pp. 220-1. In this connection we call the court's attention to the fact that the Government's highest estimate of the amount of gasoline sold on the spot market is, in each case, *50%* greater than its lowest estimate. It is well settled that nothing can be proved by such widely varying estimates. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 182 (1931).

[4]Langfitt, R. 1145.

[5]Def. Exs. 878, R. 3463; 879, R. 3465; Everett, R. 1158-60.

deficiency was in excess of 409,000 barrels and 387,000 barrels, respectively. It purchased gasoline in almost exactly corresponding amounts to take care of this situation. Globe of Oklahoma's purchasing during the indictment period occurred when the Blackwell refinery was shut down and inventories were practically zero.[6] Globe of Illinois purchased only when inventories had reached an extremely low level and demand was very high. Mid-Continent's sales were greatly in excess of its capacity to produce and it would have bought the same amount whether there had been a Tank Car Stabilization Committee or not.[7] Phillips' refineries during 1935 and 1936 had to be operated in excess of their safe normal capacity. The company had purchased gasoline regularly since 1931.[8] Empire, Socony and Wadhams had refinery shut-downs which necessitated their buying gasoline to meet their sales requirements.[9] Socony had always purchased substantial quantities of gasoline from independent refiners and such purchasing had been Jacobi's regular job long before 1935.[10] Continental had always been chronically short of gasoline. It had been forced to purchase substantial amounts of gasoline in each year since 1929.[11] Pure, Sinclair and Skelly bought more in 1936

[6]J. D. Miller, R. 1612-13.

[7]McDowell, R. 1215.

[8]Kelly, R. 840-841.

[9]Def. Exs. 939-941, R. 3611-13; Jacobi, R. 491, 435.

[10]Jacobi, R. 356, 461.

[11]Bosworth, R. 848. The situation was the same as to other companies, such as Standard of Indiana and Barnsdall, which were granted new trials by the District Court. R. 871, 874, 552, 508, 542.

when the buying program was operating only four months than they did in 1935 when it was operating ten months. Globe purchased almost as much during the first six months of 1937 as it had during 1935. Pure purchased more heavily during this period than in 1935.[12] Continental purchased more heavily in 1934 and 1935.[13] Sinclair purchased more heavily in January and February 1935 than it had during the buying program.[14] Globe of Kansas purchased more heavily both before and after the indictment period than during it.[15]

Finally, and most conclusive of all, *the respondents as a whole purchased 27% more heavily in the eight months following the abandonment of the buying program than they did during the fourteen months of the buying program.*[16]

Thus it is in direct contravention of the record to contend that the buying program "removed" from the spot market all of the gasoline which the respondents purchased during the period of the program or that "the defendants made no serious attempt to show any legitimate business reason for the acquisition of most of this gasoline" (B. 12).

(2) From April 1934 until May 27, 1935 the system of refinery control under the N.I.R.A. was administered for the express purpose of depleting the major companies' inventories so that they would be forced to go out into the market and purchase gasoline from independent refiners. By the end of 1934 majors' inventories were very seriously

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[12]Def. Exs. 739, 853, 854, R. 3226, 3401, 3405.
[13]Bosworth, Cross, R. 848.
[14]J. D. Miller, R. 1635.
[15]Def. Ex. 1000, R. 3762.
[16]J. D. Miller, R. 1641.

depleted, and many of them were being forced to purchase gasoline.[17]

(3) In March 1935 the National Coordinator's office, with the approval of Secretary Ickes, requested the major companies to curtail their manufacture of gasoline during March by some 1,400,000 barrels. The purpose of this voluntary curtailment was to compel the major companies to purchase gasoline from independent refiners. In response to the request the major companies voluntarily curtailed their manufacture by some 960,000 barrels.[18]

(4) During March, April and May, 1935, when the major companies' operations were thus curtailed, the demand for gasoline increased to such an extent that the amount of gasoline which they had on hand was 3,000,000 barrels or 15,000 tank cars short of the amount which they needed to supply their customers.[19] According to the Government's own figures, the total amount which the respondents bought in 1935 was only 93,394,737 gallons or 11,684 tank cars.[20]

In view of the evidence reviewed above the assertion that the respondents had excess refining capacity (B. 12) is also obviously in error. The authority cited for it is the testimony of the witness Shatford that "the major companies began to increase their refining facilities so that they soon reached a point where they could manufacture all the gasoline that they needed for their own customers. * * * In addition to that they had enough gasoline so that they had some to spare." If the balance of the tes-

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[17]Shatford, R. 1010, 1011, 1013.

[18]Shatford, R. 1011, 1026-7, 1028-9, 1034-5; Def. Ex. 842. R. 3360.

[19]Shatford, R. 1065-8.

[20]Govt. Ex. 747, R. 3270.

timony is read it will be seen that this evidence related, not to conditions in 1935 and 1936, but to conditions ten years before.[21]

The statement (B. 12-13) that the respondents were able to draw on inventory to meet unexpected increases in demand is equally misleading. The very record reference cited to support the statement (Shatford, R. 1010) refutes it: "The gasoline inventory levels as of January 1, 1935 were about 53,900,000 barrels or approximately 54,000,000 barrels. *That was very low.* • • • The stocks on January 1, 1935 were quite low and it was that situation that I wanted to have as National Coordinator because of the fact that it would create a firm situation in the market. As a result of such a firm situation we would have a higher price for gasoline. *The effect of low inventories upon major company purchases was to increase the purchases* • • •."

VI. The Government's discussion of "Respondents' attempt to show governmental acquiescence in or approval of their conspiracy" (B. 34).

The Government's statement contains no description of the evidence which it says was offered "to show that certain Government officers encouraged the defendants or acquiesced in the activities for which they are indicted". The five pages of its statement which discuss this point, however, contain a number of statements concerning this evidence and the purpose for which it was adduced which require answer before any discussion of the evidence itself can be attempted.

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[21] "One of the competitive conditions that resulted from this surplus supply of gasoline in the hands of the major companies was a new form of contract which, as I remember it, came along about 1924 or 1925." (Shatford, R. 999.)

In the first place the Government's comments show that notwithstanding repeated statements by the respondents both in the trial court and the Circuit Court of Appeals it believes that this evidence was offered for the purpose of establishing immunity from prosecution under the Sherman Law, pursuant to Section 6 of the N.I.R.A. Thus the Government stresses: (1) the fact that the alleged conspiracy continued after the Schechter decision on May 27, 1935, which invalidated the N.I.R.A. (B. 35-36); (2) the fact that the respondent Arnott told the Petroleum Administrative Board that he was not asking its authorization and that he was acting "on his own responsibility" (B. 37); and (3) the fact that the respondent Arnott expressed "skepticism" as to the likelihood of being able to obtain formal approval for the buying program (B. 38-39).

All of these considerations are irrelevant. The respondents have never contended that either the admitted or excluded evidence on this subject could entitle them to immunity from prosecution under the Sherman Law. Their position has always been, and their position is now that the expressed attitude of the Federal Petroleum Administration was a vital "fact and circumstance surrounding their activities."[22]

The Government also states that "there is nothing in the record to show that these officials were ever aware of the real nature of the defendants' activities". (B. 36) The substance of what Arnott told the Administrative Board on March 12, 1935, is contained in Defendants' Exhibit 69[23] which is a stenographic transcript of what he told the District Allocators' meeting under the Code on the next day.

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[22]See pp. 179-84, *infra*.
[23]R. 2653.

Reference to that exhibit will show that Arnott made a complete disclosure of every essential feature of the respondents' purchasing activities both in the Mid-Continent and in East Texas.[24]

The Government also treats the evidence of certain buying programs sponsored by the Department of the Interior in 1934 as if it had been offered to show "that the defendants' buying program would have received, had this been requested, administrative approval" (B. 38). These buying programs have already been referred to in this statement of facts. Evidence as to them was offered, not on the issue of approval, but to show that distress gasoline was recognized by the Government as a "competitive evil," which had to be eliminated.

Finally, the Government contends (B. 37-38) that there is no evidence that Government officials approved of the respondents' activities after hot oil had been eliminated in March, 1935. The evidence which follows shows that most of the manifestations of Government encouragement and cooperation occurred after that date.

A. The period from the appointment of the Tank-Car Stabilization Committee up to the report of the Blazer Committee.

Immediately after the General Stabilization Meeting of January 4, 1935, at which he appointed the Tank-Car Stabilization Committee, Arnott returned to Washington

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[24]The Government stresses the fact that Arnott said that "There is going to be no agreements and no group buying" (B. 37, n. 51). It is obvious that Arnott was referring to group buying through a pool or agency and to formal agreements such as had been employed under the Government buying programs of 1934. (See p. 28, *supra* and pp. 176-7, *infra*.)

and discussed the seriousness of the problem of parity and the appointment of this committee with members of the Petroleum Administrative Board. He also discussed the critical situation occasioned by the *Panama* decision, and learned that the Government was drafting legislation to meet the situation.[1]

Shortly thereafter, the former defendant, I. A. O'Shaughnessy, who was a member of the Tank-Car Stabilization Committee, spoke of the appointment of that committee for the purpose of securing a return to parity in a telegram to Charles Fahy, the Deputy Petroleum Administrator. He pointed out that the *Panama* decision had delayed the committee in getting to work, and he stressed the critical situation as to the price of crude if something were not done.[2]

Fahy replied:[3]

> "* * * I am sure you know that the tank car situation with relation to the price of crude is one about which we have no disagreement. How to bring about a correction is the stumbling block. I may say, however, that I see nothing in the recent Supreme Court decision which in any way affects endeavors to reach a solution * * *."

Fahy also expressed interest in any ideas which O'Shaughnessy might have, and pointed out that the Administrator himself had recognized the seriousness of the situation by appointing a committee to look into the condition of the small refiner. O'Shaughnessy read his telegram, together

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[1]Arnott R. 1698, 1699-1700.
[2]Def. Ex. 893, R. 3491.
[3]Def. Ex. 894, R. 3492.

with Fahy's reply thereto, at the first meeting of the Tank-Car Stabilization Committee on February 5th to convince the committee that an attempt should be made to achieve parity without cutting the price of crude.[4]

Shortly after Arnott first talked with Buckley, he wrote Fahy that there was a movement on foot in East Texas of which he would tell him when he was next in Washington, and that there were also hopeful developments in the Mid-Continent field.[5]

Arnott also saw Dr. Frey, another member of the Board, in Chicago about February 25th, and either then or about that time told him of the developments in the East Texas and Mid-Continent situations.[6]

In March, 1935, the National Coordinator of Refinery Allocations under the Code, acting with the knowledge and approval of the Federal Petroleum Administration, requested the major companies to cooperate with the Administration by curtailing their manufacture of gasoline during March by some 1,400,000 barrels.[7] [The Petroleum Administration had been advised that one of the purposes of the plan was to reduce the refinery output of major companies and thereby compel them to buy a part of their requirements from independent refiners.][7a] After receiving this request the major companies voluntarily

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[4]McDowell, R. 1181-2.

[5]Def. Ex. 969, R. 3692; Arnott, R. 1729.

[6]Arnott, R. 1729-30, cross, R. 1745-6.

[7]Shatford, R. 1029, 1034-5; Def. Ex. 842, R. 3360.

[7a]Shatford offers, R. 1016-8, 1027; Def. Ex. 842, R. 3360. "The curtailment was requested though the Secretary made no formal order on the subject because, as the witness expressed it, 'Everybody was running around carrying water in their hat, trying to put out the fire.'" (Shatford, R. 1047.)

curtailed their manufacture of gasoline by some 960,000 barrels of gasoline in March.[8]

Shortly afterwards, on March 12th, when Arnott was in Washington to attend the District Allocators' meeting, at which he discussed the buying of distress gasoline in the Mid-Continent and Texas fields,[9] he went in to see the Petroleum Administrative Board, and talked to chairman Fahy and his associates, Dr. John W. Frey and E. B. Swanson.[10] Fahy was much interested, and asked whether there was anything which Arnott thought raised a question under the Anti-Trust Laws.[11] Arnott said he did not think so, and proceeded to outline what the situation was and what he was doing. He described both the Mid-Continent situation and Buckley's efforts to help the East Texas refiners; in fact, the matters which he had come down to Washington to discuss with the District Allocators and which he outlined the next day before them.[12]

Arnott did not ask any formal or written approval of what was being done.[13] He testified that it did not occur to him to do so.[14] He had been engaged in securing informal cooperative action in aid of the common interests and objectives of the Government and indus-

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[8]Shatford, R. 1011, 1026-7, 1028-9, 1034-5; Def. Ex. 842, R. 3360.

[9]Def. Ex. 69, R. 2653.

[10]Frey, R. 1267, *et seq.*; Arnott, R. 1730, *et seq.*

[11]Frey, R. p. 1285, cross, R. 1294, redirect, R. 1335; Arnott, R. 1730.

[12]Frey, R. 1285, redirect, R. 1335; Arnott, R. 1730.

[13]Frey, R. 1279, cross, R. 1302, redirect, R. 1335-6, recross, R. 1338; Arnott, R. 1730.

[14]Arnott, R. 1730.

try for the last two years.[15] He felt that the members of the Board thought that his plans were sound and hoped that they would work.[16] If he had thought that they disapproved he would have discontinued his activities.[17] According to Frey, Fahy and Arnott agreed that the latter was conducting the Mid-Continent buying program "on his own responsibility."[18]

B. The Blazer Committee.

A few days after the conference of March 12th, the Blazer Committee made its report.[1] This was the "Petroleum Code Survey Committee on Small Enterprises," appointed by Secretary Ickes, which Fahy had referred to in the letter to O'Shaughnessy mentioned above.[2] The duty of the committee was to study the plight of the small units in the industry, and to make recommendations as to what should be done to overcome the difficulties under which the industry was laboring.[3]

One of the main features of the committee's report was a reference to, and approval of, the buying of distress gasoline by the large refiners from the small ones.

In the following narrative we shall italicize the portions of the documents referred to which contain obvious references to such buying.

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[15]See pp. 21 *et seq., supra.*

[16]Arnott, R. 1730, 1731.

[17]Arnott, R. 1736.

[18]Frey, cross, R. 1293, 1294, 1301, 1302, recross, R. 1338. Arnott believed that these discussions occurred at the subsequent conference of May 8, 1935, described at pp. 93-6, *infra*, and that the remarks had been made in another connection. Arnott, R. 1730-1.

[1]Frey, redirect, R. 1320; Swensrud, R. 1377.

[2]Def. Ex. 894, R. 3492; see p. 85, *supra.*

[3]Frey, redirect, R. 1320; Swensrud, R. 1377.

[The report stated the conclusions of the committee as follows:[4]

"Immediate relief is necessary if non-integrated refineries are not to be eliminated; it can come in only two forms.

1. An immediate and sustained increase in tank-car and retail gasoline prices to a parity with present crude prices, or

2. A reduction in the posted prices of crude oil to a parity with gasoline.

"We agree * * * that it would be more desirable for the solution to come from an increase in gasoline prices instead of a reduction in crude, but if it cannot be done one way it should be done the other way.

"*We favor making one more effort at raising gasoline prices * * * possibly only the impetus of concerted buying is needed to obtain a decided change for the better * * *. We know of nothing, apart from continued improvement in crude production control, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with the broad stabilization program. We, therefore, urge that the administrator give it his approval and active support.*

"*It should be possible to have such a program functioning quickly. Profiting by the mistake of previous efforts, * * * we believe such a program might be successful in raising both tank-car and retail prices to their proper level in relationship to crude oil prices * * *.*

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[4]Def. Ex. 924 for identification, R. 3530, 3558-60.

"• • • We find that abnormally low retail prices can depress tank-car prices just as much as low tank-car prices can pull down the retail price structure. Thus it appears to be essential that both prices move up together.

"Unfortunately, many people outside the Industry who recognize the desirability of conserving petroleum reserves and who strongly favor the preservation of small enterprises, are likely to be the first to criticize a moderate increase in retail prices of gasoline, not realizing that in so doing they are striking directly at the non-integrated units and throwing the entire Industry into the hands of a few large integrated companies.

"If • • • gasoline prices do not advance to an approximate parity with crude prices by an early date, within thirty days or thereabouts, or if they do not continue in such parity thereafter, then we recommend an immediate reduction in the price of crude oil to a parity with refined products • • •."

[On March 22, 1935, Fahy, the chairman of the Petroleum Administrative Board, submitted a memorandum to Secretary Ickes, in regard to the Blazer report.[5] In the course of this memorandum he said:

"It is not the purpose of this memorandum to criticize or attempt to answer any of the findings or recommendations of the Committee; although the current improvement in tank-car price and the present fairly stabilized retail market is affording relief to some extent to the non-integrated refiner • • •. In our opinion the report should be re-

[5]Def. Ex. 1030 for identification, R. 3869, 3873.

leased immediately * * * *there are a number of things recommended which it would be well to do something about* * * *.*

"We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted; e. g., we have encouraged stabilization efforts designed at this time to aid the independent refiner, * * *."*]

Thus it appears that the Petroleum Administrative Board was "encouraging" the Mid-Continent buying program, and that the Secretary of the Interior was advised of that fact.

Upon receipt of the report of the Committee on Small Enterprises, Secretary Ickes met with the Petroleum Administrative Board in his office. He stated to the Board that he was in favor of industrial action to bring about parity between the price of crude oil and the price of gasoline. He further stated that if such parity were not achieved within three or four weeks, he was going to call a meeting of representatives of the industry to see what could be done about it.[6]

On March 30, 1935, Secretary Ickes again commented upon the report of the Committee on Small Enterprises in a letter addressed to B. P. Lientz of Kansas City, Missouri,[7] which referred to the disparity between the prices of crude oil and gasoline as follows:

"* * * This situation has been deplorable for many months, but it is my understanding that at present *the activity of the Stabilization Committees is having a distinct effect in the improvement of refinery prices,* * * *."*

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[6]Frey, redirect, R. 1319.
[7]Def. Ex. 995, R. 3749.

[On April 23rd Fahy wired Blazer, the chairman of the Committee on Small Enterprises, as follows:[8]

"Would appreciate informal views your committee as to *whether gasoline prices have advanced to an approximate parity with crude prices* so as to obviate present necessity for reduction in crude oil price as recommended in refining conclusions and recommendations contained in report your committee."

[On the same day Blazer wired the following reply:[9]

"Glad to advise informal opinion our Committee there is now no need for reduction crude oil prices since *we consider tank-car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank-car and retail prices.*"

[On April 30th Blazer addressed a letter to Fahy which, among other things, contained the following:[10]

"It has been suggested, though, that it be clearly understood that our Committee in going on record that there is no need for a reduction in crude oil prices at this time, is acting on the belief that *small additional advances will be made in both tank-car and retail prices of gasoline.*

• • •

"*Our Committee has been very much pleased with the success of the program to stabilize tank-car markets. We believe it has been handled in a manner calculated to benefit the non-integrated re-*

[8]Def. Ex. 921 for identification, R. 3528.
[9]Def. Ex. 922 for identification, R. 3528.
[10]Def. Ex. 993 for identification, R. 3746, 3747.

finers and without disadvantage to marketers. Of course, the real question is whether, after parity of gasoline and crude oil prices has been obtained, they can be maintained without excessive continued buying by the major companies • • • I believe I can speak for our entire Committee when I say that we believe fundamental conditions in the industry have been sufficiently improved to bring about and maintain prices for finished products which will justify $1.00 crude oil."]

C. The period from April 30th to the end of the Code.

1. *Arnott's conference with the Petroleum Administrative Board, May 8, 1935.*

In the course of the attempts of Arnott's stabilization committees to deal with retail price wars in Chicago, a moratorium on retail accounts had been adopted. The Petroleum Administrative Board requested Arnott to come to Washington to discuss with them certain complaints which it had received with reference to the moratorium and to explore the question whether such action might violate the Anti-Trust Laws unless Arnott obtained written approval from Secretary Ickes.[1] A letter dated April 2, 1935, from Secretary Ickes to Arnott read in part as follows:[1a]

> "I have just received a report from the Petroleum Administrative Board with respect to a moratorium on dealer accounts which is reported to have been arrived at by agreement between the companies supplying the major part of the gasoline sold in the Chicago area.
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> • • •

[1]Frey, cross, R. 1305-6, 1315.

[1a]Govt. Ex. 980, R. 3722-3; see Frey, R. 1305, 1316.

"I understand that the temporary character of a number of situations and the need for immediate action has made formalized agreements impracticable and in a number of instances they may be unnecessary. However, when the understandings arrived at as bases of solution of price wars affecting the industry over a considerable * * * period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal. If any such agreements have been made I should like a report as to them. If they require approval to be effective, as my information leads me to believe is the case with respect to the moratorium, I should be glad to give consideration to them under the provisions of the Act.

"I appreciate greatly your cooperation with the Administration in taking on the difficult work of directing a program of stabilization and I know that you will understand that this action is necessary in order to comply with the requirements of law with which I am charged with administrative responsibility."

About the same time the Petroleum Administrative Board required certain modifications of the procedure which was to be followed by Arnott under the letter of July 20, 1934, in which he had been asked to undertake stabilization activities.[3]

Some friction was occasioned because Secretary Ickes had openly criticized the moratorium before taking the

[3]Frey, cross, R. 1305; Arnott, R. 1731.

matter up with Arnott, particularly as Arnott felt that the proposed changes in procedure would make his work impracticable.[3] The result was a rather heated session between Fahy, Arnott and J. D. Collett, the chairman of the Planning and Coordination Committee, on May 8, 1935.[4] At the end everyone cooled off, and arrangements were made for working out practicable changes in procedure under the letter of July 20th.[5]

After the main business of the meeting had been concluded, there was some incidental discussion of the buying program.[6] According to Frey, Fahy asked Arnott if the buying program was continuing and Arnott replied that it was.[7] Fahy then asked him whether he was taking the letter of July 20th as authority for his work, saying that neither the letter of July 20th nor the Code conferred such authority.[8] Arnott replied that he was not relying on the letter of July 20th.[9] Arnott and Collett recalled Fahy's asking how the buying program was going, but did not recall this reference to authority. They did recall that Arnott had said at this meeting that he was acting on his own responsibility in certain other stabilization activities that were under discussion.[10] [Titus, the counsel for the Planning and Coordination Committee, had advised Arnott that the letter of July 20th, although a request for

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[3]Frey, cross, R. 1305.

[4]Frey, cross R. 1305-7, redirect, R. 1315, 1335-7.

[5]Frey, redirect, R. 1336-7.

[6]Frey, cross, R. 1302, redirect, R. 1335.

[7]Frey, redirect, R. 1335; Arnott, R. 1731.

[8]Frey, cross, R. 1299-1301, 1307, recross, R. 1337-8, redirect, R. 1335.

[9]Frey, redirect, R. 1336.

[10]Arnott, R. 1731; Collett, R. 1802-3.

him to undertake certain matters, did not confer any authority under the N.I.R.A.[11]]

2. *Arnott's conference with Fahy, May 10, 1935.*

Two days after the conference of May 8th, Fahy had another conference with Arnott. The Planning and Coordination Committee had appointed a committee of three, consisting of Arnott, Collett and Majewski, to discuss the contents of the Blazer report with the Petroleum Administrative Board.[12]

The committee met in Fahy's office on May 10, 1935. It was noted that the Blazer Committee had recommended that the major companies should buy distress gasoline from independent refiners. Arnott and Majewski pointed out that this was already being done.[13] It was also pointed out that this buying had already resulted in some improvement in the situation so that the complaints of the independent refiners were diminishing, and that the system of refinery allocations and the voluntary curtailment of refinery runs in March had contributed still further to the improvement of the situation.[14]

Fahy replied: "That is quite so and disposes of that part of the report."[15]

3. *Fahy's request to Arnott to stabilize the Pennsylvania refinery market, May 14, 1935.*

[The respondents offered to prove that four days later, on May 14th, Fahy requested Arnott to extend his buying

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[11]Def. Ex. 892 for identification, R. 3489.
[12]Arnott, R. 1731, 1733; Collett, R. 1803.
[13]Arnott, R. 1733, 1734; Collett, R. 1803.
[14]Collett, R. 1803, cross, R. 1806.
[15]Arnott, R. 1734; Collett, R. 1803.

program activities into Pennsylvania. The proof offered was as follows:

[(1) The small refiners in Pennsylvania, like those in the Mid-Continent, were suffering as a result of the disparity between the price of crude oil and the products made from crude oil. They had also built up excessive inventories which could be sold only at distress prices. Many of these refiners were being forced out of business.[16]

[(2) The condition of the Pennsylvania refiners was well known to Fahy, Swanson and Frey of the Petroleum Administrative Board.[17].

[(3) The Pennsylvania refiners had several times requested the Petroleum Administrative Board to take steps to alleviate their condition. In each case the Board had asked them to wait until the results of the buying program being conducted in the Mid-Continent became apparent.[18]

[(4) On May 14, 1935, after a conference with J. M. Vockel and G. E. Willey of the Waverly Oil Works in Pennsylvania, Chairman Fahy of the Petroleum Administrative Board had sent the following telegram[19] to Arnott:

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[16]Frey offer, R. 1288-9.

[17]*Ibid.* Brundred offer, R. 1354, 1355, 1356.

[18]Frey offer, R. 1287-8; Vockel offer, R. 1345-50; Def. Ex. 972 for identification, R. 3694.

[19]Def. Ex. 916 for identification, R. 3520; Frey offer, R. 1288; Vockel offer, R. 1351.

["Mr. C. E. Arnott,
c/o American Petroleum Institute,
Mayo Hotel,
Tulsa, Oklahoma.

"S. M. Vockel and G. E. Willey officials Waverly Oil Works on behalf own company and other small Pennsylvania refiners yesterday and today presented detailed picture refining situation their section. Present disparity between Pennsylvania grade crude and refined prices undoubtedly makes impossible continued operation several plants. Problem there related more to stabilized markets lubricants than gasoline. Hope you can arrange for prompt consideration this problem by Stabilization Committee looking both to immediate adjustments as well as long view correction. Would appreciate your assistance in this situation as it involves plants of long establishment which undoubtedly have not benefited equally with others under stabilization program because of their dependence on lubricants rather than gasoline. Please wire me as to possibility your undertaking this.

"Charles Fahy."

[(5) In sending the telegram of May 14th the Petroleum Administrative Board wanted Arnott and the Stabilization Committee to go into Pennsylvania to improve the condition of the refinery market in that State by the same method that the Stabilization Committee had used under the buying program in the Mid-Continent area. The Board believed that Arnott could make some arrangements whereby the major companies would purchase from the small independent refiners the

excessive lubricants which were overhanging the market in Pennsylvania, and in that way both relieve the plight of the independent refiner and cause the prices of finished refinery products to rise to their proper parity with the price of Pennsylvania grade crude oil.[20]

[(6) On May 27, 1935 E. B. Swanson of the Petroleum Administrative Board wrote W. J. Brundred that the Board felt "that the Stabilization Committee * * * might be of definite assistance in connection with lubricants *as they have been in connection with gasoline.*"[21]] (Italics supplied.)

D. After the Code.

With the *Schechter* decision on May 29th Arnott's activities as chairman of the Marketing Committee and as "Stabilizer," pursuant to the request of Mr. Ickes in his letter of July 20th, came to an end.[1] He was thanked by Fahy, Deputy Oil Administrator, and by Secretary Ickes, for his services.[2]

Dr. Frey testified as follows:

> (1) That although he had never had any direct contact with the Tank-Car Stabilization Committee's work and was not familiar with its detailed operations,[3] Arnott had made reports about the Committee to the Board,[4] and he (Frey) was familiar with the Committee's objectives.[5]

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[20]Frey offer, R. 1289-90.

[21]Def. Ex. 915 for identification, R. 3519; Brundred offer, R. 1355.

[1]Def. Ex. 975, R. 3716.

[2]Def. Ex. 976, R. 3716.

[3]Frey, R. 1266, 1267, cross, R. 1302.

[4]*Ibid;* see Frey, R. 1314.

[5]Frey, R. 1266.

(2) That in his opinion the Tank-Car Stabilization Committee was an offshoot of the General Stabilization Committee[6] which had been appointed under authority of the letter of July 20, 1934, from Ickes to Arnott.[7]

(3) That Arnott had never asked the Petroleum Administrative Board for official approval or official criticism of the Committee's activities.[8]

(4) That, so far as he was concerned, the Mid-Continent buying program was an industry activity, without any official standing.[9] That is to say, it had not been formally authorized by anybody in the Petroleum Administrative Board nor by the Secretary of the Interior. Only Secretary Ickes could have given such formal authorization.[10]

(5) That he believed that major company buying was helpful to stabilization;[11] that the sale of gasoline at distress prices was frequently responsible for price wars;[12] in his judgment, it was impossible to maintain a stabilized retail market if the tank-car market continued to be subnormal.[13]

(6) That in his opinion the presence of distress gasoline on the market in January and February of 1935 was one of the obstacles which was preventing the tank-car market from achieving parity with the price of crude oil.[14]

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[6] *Ibid.*
[7] Frey, R. 1291.
[8] Frey, cross, R. 1294, 1307, redirect, R. 1335, 1336.
[9] Frey, cross, R. 1293.
[10] Frey, R. 1270, 1279.
[11] Frey, redirect, R. 1315-6.
[12] Frey, redirect, R. 1328.
[13] Frey, redirect, R. 1332.
[14] Frey, redirect, R. 1327.

(7) That Secretary Ickes considered it an undesirable state of affairs, and particularly hard on the independent refiners, for the price of gasoline at the refinery to be out of parity with the price of crude oil.[15]

Toward the end of 1935 the Annual Report of the Secretary of the Interior for the fiscal year ending June 30, 1935, was published.[16] It contained the following statement:

> "The operations of the Tender Board of the production provisions of the code and refinery amendment, *and of the stabilization committee of the planning and coordination committee with the cooperation of the Petroleum Administrative Board, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935.*" (Italics supplied.)

On June 1, 1936, there appeared the Final Report of the Marketing Division of the Petroleum Administrative Board.[17] This report had been prepared pursuant to an Executive Order of President Roosevelt dated June 15, 1935 (No. 7075), and under the direction of Secretary Ickes.

[The respondents offered certain portions of this report in evidence. After commenting on the serious problems of the industry in 1934, the letter of July 20, 1934, which Secretary Ickes had addressed to Mr. Arnott, and the efforts to eliminate price wars, the report stated:

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[15]Frey, redirect, R. 1328.
[16]Def. Ex. 917, R. 3522, 3525.
[17]Def. Ex. 914 for identification, R. 3512, 3518; Frey, R. 1281.

["As the various problems were offered for discussion at the general stabilization committee meetings, subcommittees were appointed to make recommendations among these subcommittees. *One of the most important was the tank-car committee, which attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank car market was essential to a stabilized retail structure* * * *.

* * *

["The stabilization program was perhaps the outstanding development under the code. It received the support of most elements in the industry and it was effective to a greater degree in eliminating price wars and stabilizing prices and conditions than any other movement yet tried. In many areas the best price structure in years prevailed during the last 6 months of the code. Nearly all company representatives gave credit for this condition to the stabilization program.

["Although no authority existed in the Stabilization Committee to enforce any of the recommendations which it might make, its recommendations were generally effective. This was largely because its aims and purposes were to maintain a uniform and profitable price structure by as nearly direct means as possible. Many critics of the code were ardent supporters of the stabilization program, feeling that the code was cumbersome and the machinery for its enforcement so complex as to be ineffectual, but that the stabilization program went to the heart of the problem and was more effective."] (Italics supplied.)

[The respondents offered to show that on February 12, 1937, Secretary Ickes and E. B. Swanson, a former mem-

ber of the Petroleum Administrative Board testified before the Senate Committee on Finance as follows:

> "Senator Connally: Mr. Holland is in possession, is he, of the details in regard to those buying pools and things of that kind?
>
> "Secretary Ickes: Mr. Holland or Mr. Swanson has all of that, because he was with the Oil Administration at the time * * *.
>
> * * * *
>
> "Mr. Swanson: Mr. Chairman there were several so-called buying pool efforts, that began in December of 1933 and *continued from then on during the entire period of the Petroleum Code.*
>
> "Senator Connally: *What was the purpose of the Department in participating or in authorizing or in aiding those buying pools?*
>
> "Mr. Swanson: *It was an effort of the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss.*"][18] (Italics supplied.)

VII. THE GOVERNMENT'S DISCUSSION OF "RESPONDENTS' ATTEMPT TO SHOW THAT THE GASOLINE OF INDEPENDENT REFINERS WHICH THE MAJORS CONCERTEDLY PURCHASED, AND WHICH THEY DESIGNATED 'SURPLUS' OR 'DISTRESS', CONSTITUTED A COMPETITIVE EVIL" (B. 39).

Under this heading the Government argues that the decision of this Court in the case of *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (B. 40) shows that the distress gasoline which the respondents purchased did not

[18] R. 1841-2.

constitute a competitive evil. It is therefore necessary to answer this section as an argument.

The argument of the Government that distress or surplus gasoline does not constitute a competitive evil is flatly contradicted by the definite and unmistakable conclusion of the Circuit Court of Appeals that—

> "• • • If there is any one thing completely established, it is that the oil industry, as well as numerous governmental agencies, federal and state, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable, but necessary, if the industry was to survive, to say nothing of prospering" (R. 3929).

The references to the record set forth below[1] which fully and completely support this conclusion.

The Government's argument ignores two fundamental conditions which caused distress gasoline. It is only from an understanding of these conditions that the nature of distress gasoline can be understood.

First: The independent refiner's purchase contracts required him to take all the crude oil which the seller was permitted by law to produce. If he refused to comply with this provision of his contract, the seller had the option to cancel the contract. While some minor violations of this provision might be tolerated, the record is uncontradicted

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[1]Jacobi, R. 385-6; Cline, R. 642; Bradshaw, R. 671-2; Steiger, R. 751-2; Franklin, R. 929; Shatford, R. 1003; McDowell, R. 1166; Frey, R. 1327. Def. Ex. 831, 832 for identification, R. 3329, 3330; Def. Ex. 848 for identification, R. 3389; Shatford offer, R. 1045-52. Def. Exs. 844, 845, 846 and 847 for identification. R. 3367, 3372, 3376, 3386, 3389; Def. Ex. 1029 for identification, R. 3817.

that any shutdown or substantial curtailment of operations by an independent refiner would have resulted in the loss of his crude connections. The Government suggests that there is a distinction between the possibility of a complete shut-down and of a substantial curtailment. There is no such distinction. The law of capture would prevent the crude oil producer from curtailing production and the independent refiner would have to take that entire production or risk loss of his crude connection. Moreover, the Government's argument ignores the fact, fundamental in refining, that it is economically impossible to run a refinery at a low percentage of capacity since the mounting unit cost at a low operating rate wipes out all profit.[2] The point is well illustrated by the testimony of Gray, the manager of the Waggoner Refining Company. He testified as follows:

> "When conditions are bad and prices are low, some small refineries do shut down temporarily and some reduce their throughput. By 'throughput' I mean the amount of oil that they put through their plants. But most refineries are one-unit plants, and have a maximum and a minimum at which they can operate. For instance, if you have a plant capable of turning out 2,000 barrels of gasoline a day through one unit, you might be able to produce 1,200 to 1,500 barrels a day economically, through that unit, but you couldn't go below that.
>
> "A number of refiners have a pipe line gathering system through which they transport oil which they buy from the producer in the field. If they shut down their plant, they can't buy that fellow's oil, and he seeks another outlet for his oil. When

[2]Evans, R. 542-4.

> they get ready to go back in business again, they have a whole system of pipe lines lying in the ground which they have to dig up and put some place else, providing they can find somebody else that will sell them the oil. It is quite frequently difficult to persuade somebody to sell you oil if they know you are a company that is liable to run this month and shut down next month. Therefore, you are forced to stand the punishment in the hope of better days" (R. 1826-7).

Second: Once the gasoline had been manufactured, the independent refiners had to sell it immediately. Few of them had any substantial amount of storage capacity for either gasoline or crude oil. Each had to refine the crude oil as he received it and sell his gasoline as fast as he made it.[3] Inevitably, such gasoline, which had to be manufactured and could not be stored and which had to be disposed of immediately was dumped on the market for whatever price it would bring. Inevitably such sales drove the market down.[4]

The Government states that one set of defense witnesses "defined 'distress' or 'surplus' gasoline as being any and all gasoline produced by an independent refiner in excess of the requirements of his regular trade customers" (B. 41). From this it deduces that the sale of distress gasoline cannot be a competitive evil because:

> "* * *If the only sales on the spot market were sales to regular customers, this would completely exclude from the market all jobbers and brokers

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[3]Franklin, R. 929-30; Shatford, R. 1003, 1010; Gray, R. 1827-8; McDowell, R. 1166.

[4]Shatford, R. 1003.

accustomed to purchase on a spot basis, not from a particular independent refiner, but from any refiner having supplies on hand" (B. 44).

This statement rests upon a plain misconstruction of the witnesses' testimony. They did not testify that distress gasoline was any gasoline which could not be sold to specific customers of long standing. The purport of their testimony was that even after all customers of long standing had been satisfied and after all buyers who bought "not from any particular independent refiner, but from any refiner having supplies on hand" had been satisfied, there would still be distress or surplus gasoline.[5] In other words, distress gasoline was that gasoline which must be sold, but which was left after the refiner had exhausted every effort to sell his gasoline at the going market price to anybody, regardless of whether or not he had ever done business with them before.

It is obvious from the above recital that surplus gasoline, like the distress coal in the *Appalachian Coals* case, had to be sold *immediately*. This meant "forced" sales which necessarily entailed a terrific competitive disadvantage to the seller. In such a market there were always potential buyers who did not have to buy at the moment. In other words, the small refiner had to sell his surplus product at the moment. He sold to those under no such urgency to buy and the result was the distress price

The Government, however, argues that the term "distress gasoline" is a misnomer and "delusive" and that it does not describe the type of competitive abuse recog-

[5]See, *e. g.*, Steiger, R. 752 ("* * * it was gasoline left after they had exerted all efforts to attempt to sell it.") See Appendix A, pp. 192-216.

nized in the *Appalachian* case (B. 39-48). Upon examination it appears that this argument is based largely, if not entirely, upon two assumptions. "• • • The gasoline purchased by the majors (1) was not a by-product the production of which was beyond the refiners' control and, (2) since it was the same kind of gasoline as that sold on the spot market, the demand therefor was as broad as the entire market demand" (B. 45).

Let us examine these assumptions in order.

This record amply supports the conclusion that distress gasoline was a "by-product" in the same sense that distress coal was—that is, in the sense that the saleable product could not be manufactured without manufacturing the distress product.

First, let us examine the nature of the distress coal involved in the *Appalachian* case. As the Court pointed out (288 U. S. 362-3), the demand for the different sizes of coal varied, and no particular size could be produced without at the same time making a number of other sizes. This constantly resulted in having more of some sizes than there was regular demand for. Because of the lack of storage facilities and other conditions prevailing in the industry, the amount of any particular size which the independent producer was thus forced to produce, and which was in excess of his current demand for that size, was called "distress coal" because it had to be sold quickly—dumped on the market. This distress coal, the Court found (288 U. S. at 363), while more prevalent in some sizes was at times present in all sizes and grades, and its pressure upon the market consequently was a depressing influence upon the prices obtainable for all sizes. It appeared, and the Court found,

that one of the purposes of creating the exclusive selling agency was to provide for a more orderly marketing of distress coal, thus removing its pressure upon the market and tending to raise the price of all coal sold.

The effect of distress coal was accentuated by the practice called "pyramiding" (288 U. S. 363). This was the term applied when a producer authorized several persons to sell the same coal, and they in turn offered it to other dealers, resulting "in abnormal and destructive competition which represses the price for all coals in the market." In the same way, the depressing effect which distress gasoline had on the market was frequently magnified because the gasoline was offered simultaneously through several different brokers.[6]

It abundantly appears from the record in this case that the existence of "distress gasoline" constituted one of the major marketing problems of the industry, and that its dumping upon the market at such forced-sale prices was a destructive practice similar to the dumping of distress coal, and like it, had a depressing effect upon all prices received and upon the condition of the industry itself.

As in the case of "distress coal," the very nature of the non-integrated refiner's business compels him to produce a portion of his product which at the moment is a drug on the market. In the case of the refiner he has to *produce* this portion because, on penalty of losing his *crude oil connections,* he must take the crude oil produced by his supplier as it flows from the wells, irrespective of whether he contracts for a ready market for all the gasoline to be produced therefrom.[7] Like the coal op-

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[6]Shatford, R. 1003-4, Gray, R. 1823.
[7]Franklin, R. 926-7, 929-30; Gray, R. 1827-8.

erator, he has to dump the excess amount so produced for which there is no ready market. Neither the coal operator nor the refiner usually has sufficient storage facilities, or capital to create storage capacity, or working capital to tie up his products while storage and operating costs go on.

The Government (B. 46-7), while recognizing that in general independent refiners had nothing more than working storage, states "Other evidence shows that many independent refiners have substantial storage capacity * * *." The record citations for this statement establish no more than that one or possibly two out of 96 independent refiners had such facilities.[8]

We come now to the contention that "distress coal" was physically different from the ordinary coal supply of an operator because it was of a different size from that of his non-distress product, whereas the "distress gaso-

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[8]Exhibits 187 (R. 2754), 190 (R. 2764). The following statement in Exhibit 187 is typical of the authorities relied on by the Government:

"While refiners' stocks are not large, they are apparently holding on to such stocks as they can accumulate * * *."

Of course there was a certain amount of leeway in *working stocks* and this is all that is indicated by these exhibits and by the statements at the top of page 47 of the Government's brief. The fact that for short isolated times the working storage of some refiners was not full to the brim (Govt. Ex. 30, R. 2631) does not indicate in any way that as a general thing independent refiners did not have gasoline which they could neither store nor dispose of except on a distress basis.

In this connection it is significant that in the *Appalachian* case the Court did not find that *no* producer had storage facilities, but only that "*usually* there are no storage facilities at the mines" (288 U. S. at 363). So in this case the evidence is that *generally and usually* the small independent refiner has inadequate facilities for the storage of either surplus crude oil or surplus gasoline. (See Appendix A, pp. 204 *et seq.*)

line" cannot be physically distinguished from that marketed through orderly channels (B. 45).

The Government misstates the facts in the *Appalachian* case. The record of that case shows that all sizes of coal became distress at one time or another (See 288 U. S. 363). The fact was that while there would be apt to be a larger excess over regular demand in the case of some sizes, the phenomenon occurred as to all. There was no more possibility of physically distinguishing nut coal which would be sold under contracts or to the regular trade at the prevailing market price from nut coal which would have to be dumped regardless of price, at the mercy of scalpers and large consumers wanting to take advantage of what the Supreme Court termed the "inequality of bargaining power" of the small producer, than there is of physically distinguishing "distress" from other gasoline.

Moreover, whether or not the distress material was physically distinguishable from non-distress material is entirely without legal significance. The coal involved in the *Appalachian* case was distress, not because it was of any particular size, *but because it was coal, the production of which was compelled by technical and economic factors irrespective of market demand. That is exactly the situation in the case of "distress" gasoline.* Because of the law of capture, the impossibility of shutting down crude oil wells, the impossibility of shutting down refineries or running them at a low fraction of capacity, and the lack of crude oil and gasoline storage facilities, a certain amount of gasoline *had to be* produced and *had to be* promptly sold.

The Government suggests (B. 13, 50-51) that "distress gasoline" was merely that part of the product

for which a refiner could not get the price he wanted. The same could be said of the coal operator. In both cases, the "distress" product was that part which had to be dumped below the prevailing market price. In both cases, that prevailing market price might be far below what the operator "wanted" in one sense of the word. It certainly was in the case of the small refiner in the winter of 1935, when the market price was 2¢ below his cost of production.[9] His "distress" product was what he would have to dump even below that artificially depressed level.

The evidence shows that the Government recognized the reality of the problem in 1934 by fostering programs for buying up "distress gasoline," not at the low of the market, but far above the market.[10] The Secretary of the Interior specifically recognized the problem of surplus or distress gasoline in his address to the industry in November 1934.[11] No one ever seems to have questioned the reality of distress gasoline, or its character as a competitive evil, except the prosecution in this case. There is ample evidence in the record to establish that, in the eyes of those best fitted to judge, it constituted one of the major problems of the oil industry.

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[9]See Def. Ex. 1024, R. 3807.
[10]See p. 28, *supra*.
[11]Def. Ex. 968, R. 3690.

SPECIFICATION OF ERRORS TO BE URGED BY THE RESPONDENTS

The Circuit Court of Appeals erred:

(1) In holding that there was no fatal variance between the indictment and the proof.[1]

(2) In sustaining the action of the district court in denying defendants' several motions for directed verdicts of not guilty.[2]

(3) In sustaining the jurisdiction of the district court.[3]

(4) In failing to rule that the arguments of Government's counsel to the jury constituted reversible error.[4]

(5) In failing to rule that the district court should have granted petitioner's several motions for new trials.[5]

SUMMARY OF ARGUMENT

This brief is divided into two parts. Part One deals with the questions presented by the Government's petition in No. 346 to review the judgment of the Circuit Court of Appeals reversing the judgments of conviction and ordering new trials. Part Two deals with the questions presented by the respondents' petition in No. 347 as to whether the Circuit Court erred in refusing to direct the trial court to dismiss the indictment.

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[1]Assignments of Error Nos. 1-16 (R. 2515-7).
[2]*Ibid.*
[3]*Ibid*, Assignments of Error 18 and 19 (R. 2518-9).
[4]Assignments of Error Nos. 37-40 (R. 2543-51).
[5]Assignment of Error No. 21 (R. 2519).

PART ONE

THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE RESPONDENTS WERE ENTITLED TO NEW TRIALS.

I.

The Circuit Court of Appeals correctly held that the charge of the trial judge constituted reversible error.

On no less than twelve different occasions the trial court instructed the jury to return verdicts of guilty if it found that the respondents had contributed in any degree to the rise in gasoline prices. It will be noted that these instructions are not concerned with whether the respondents maintained prices at controlled levels, or whether they substituted an agreed-on price for a competitive price. The sole test of legality which the instructions lay down is whether the purpose or effect of the respondents' acts was to raise prices to any extent.

The Government concedes that "The defendants, * * * offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to distress material, the removal of which did not suppress normal competition on the spot markets; * * *" (Pet. 14). Obviously, the elimination of a competitive abuse such as distress gasoline may tend to stabilize the industry and to produce fairer price levels. The instructions of the trial court, therefore, required a finding of guilty even though the jury believed that the respondents' activities had been limited to the elimination of distress gasoline and that the removal of such gasoline "did not suppress normal competition on the spot markets."

This Court has repeatedly held that concerted action to eliminate abuses which distort the normal play of competition is not to be condemned merely because the purpose or effect of the agreement may be to stabilize or raise prices. (See cases cited, pp. 148-53, *infra.*)

The Government's brief misinterprets the charge of the trial court as to the minimum requirements to sustain a verdict of guilty. As suggested above, a reading of the charge in its entirety will clearly demonstrate that the jury was instructed to return verdicts of guilty if the respondents had contributed in any degree to the rise in gasoline prices. We submit that the very most that can be claimed is that there was a conflict of instructions which resulted in confusing and misleading the jury. The Government itself argues that the instructions confused and misled the Circuit Court of Appeals. (B. 84; Pet. 18.)

Apparently, the charge was also misleading and confusing *to the Government.* It now argues that the district court "charged the jury that if it found that the defendants combined for the purpose of raising and fixing gasoline prices in the manner set forth in the indictment, and if it found that they had the power so to raise and fix prices, a restraint imposed by their combination would be unlawful and unreasonable" (B. 50). Emphasizing the word "fixed," it argues that the instruction required the jury to find a "price fixing agreement" within the meaning of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. *In its petition,* however, it summarized the charge differently. There it said that the "trial court instructed the jury that if it found that the defendants had the power to raise gasoline prices and had combined for that purpose, the restraint of trade was unreasonable and

illegal" (Pet. 2). The word "fix," which it now emphasizes, was there omitted. Obviously, if the instructions were misleading, not only to the Circuit Court, but to the Government itself, they could not have been clear to the jury. *District of Columbia* v. *McElligott*, 117 U. S. 621, 630 (1886).

The trial court also erred in instructing the jury that it was to consider the reasonableness of the respondents' acts and the facts and circumstances surrounding them, only if it first found (a) that the respondents did not have the power to raise the level of spot market prices, or (b) that they did not combine for that purpose, and (c) that their purchases affected the spot market prices only indirectly and incidentally. This, in effect, forbade the jury to consider the surrounding facts and circumstances in reaching its verdict.

II.

The Circuit Court of Appeals correctly held that the trial court committed reversible error in excluding the evidence offered by the respondents to show the facts and circumstances surrounding the alleged agreement in restraint of trade.

This Court has held that the legality of a combination such as is here presented can be determined only in the light of evidence showing "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained * * *." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

The trial court in this case erred repeatedly in excluding evidence offered by the respondents which was clearly relevant under the above rule. In many cases the evidence was necessary to show the background of the industry and the reasons for the respondents' acts. In others it bore directly upon the question of what was their purpose. In others it tended to prove that the price of gasoline was not, as alleged by the Government, arbitrary and non-competitive during the indictment period. In many instances the evidence should have been submitted to the jury not only as direct proof of the matters in question, but in order to rebut inferences which the Government sought to draw from fragmentary evidence.

The Government concedes that "there was a wealth of evidence from which opposing factual inferences could be drawn" (B. 147). Under these circumstances it was imperative that the jury have before it all of the surrounding facts and circumstances upon which the proper inferences depended.

III.

The Circuit Court of Appeals correctly held that the trial court committed reversible error in using and permitting Government counsel to use alleged transcripts of testimony before the grand jury in the examination of important witnesses.

The witnesses upon whom the Government principally relied to establish its case were employees of various of the respondents. Government counsel endeavored consistently throughout the trial, by reading from and referring to certain "alleged grand jury minutes," to persuade the jury that these witnesses were under pressure

to avoid incriminating their employers. This persistent effort had a three-fold purpose and effect: (1) to magnify the significance of any testimony of these witnesses detrimental to the defendants; (2) to suggest the existence of additional facts not covered by any testimony and even more detrimental to the defendants; and (3) to prejudice the respondents by persuading the jury that they would suborn perjury to avoid discovery of their alleged unlawful acts.

In this connection the trial court made four general types of error highly prejudicial to the respondents:

1. The court denied respondents the right to inspect the alleged transcripts of testimony before the grand jury to determine the accuracy of the alleged quotations and the statements of Government counsel with respect thereto.

2. The court permitted Government counsel to read from alleged grand jury testimony and from notes alleged to have been made from grand jury testimony which were not properly authenticated nor their accuracy sufficiently established.

3. The court repeatedly read and permitted Government counsel to read from the alleged transcripts of testimony before the grand jury under circumstances which undoubtedly led the jury to conclude that such alleged grand jury testimony was affirmative evidence in the case. In some instances it can be shown from the record that statements so read from the alleged transcripts were not true.

4. The court repeatedly permitted Government counsel to read in the presence of the jury alleged grand jury

testimony for the purported purpose of refreshing the witness' recollection, although it appeared from the record that such alleged testimony was not given contemporaneously with the occurrence to which it related.

IV.

In their closings to the jury, Government counsel made arguments which plainly constituted appeals to passion and class distinction, all tending to induce the jury to disregard the record evidence and to base their verdict upon such improper appeals.

In addition Government counsel, for the purpose of demonstrating to the jury that the entire testimony of a key witness for the respondents was unworthy of belief, resorted to assertions of personal knowledge which not only were not supported by the record, but were not correct.

V.

The granting of motions for new trials to non-appealing defendants required the granting of similar motions to respondents.

The possession of the power to raise or affect market prices arbitrarily was a fundamental issue in this case.

By their verdict of January 22, 1938, the jury found that 16 corporations and 30 individuals had conspired, as charged, and that they collectively possessed the power to execute the conspiracy. Thereafter, on July 19, 1938 the court discharged one corporation and 10 individuals and granted new trials to 3 corporations and 15 individuals. One of the corporations granted a new trial—

Standard of Indiana—alone possessed such power as would make it impossible for any group to raise prices in the Mid-Western area without its agreement and cooperation.

It follows that the fundamental issue of whether the respondents possessed the power to raise or affect prices arbitrarily, never received the consideration of the jury. The jury's finding that the entire group possessed such power by no means carried the implication that, if permitted, the jury would likewise have found that respondents, acting alone, possessed such power. Moreover, the error cannot be cured by pointing to some evidence which would have supported such a finding, if made. There must be a *jury* finding, not a finding by the court, upon this issue.

PART TWO

THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO DIRECT THE TRIAL COURT TO DISMISS THE INDICTMENT.

VI.

There was a fatal variance between the allegations of the indictment and the proof.

The indictment alleged a plan or scheme to fix the published spot market tank car price of gasoline and thereby to exact "large sums of money from thousands of jobbers." The essential allegations are:

(1) That three market journals—the Chicago Journal of Commerce, Platt's Oilgram and the National Petroleum News—regularly publish quotations purporting to be gasoline prices being paid by jobbers in spot purchases from independent refiners in tank car lots.

(2) That nearly 50% of the gasoline which the defendants and others sell to jobbers in the Mid-Western area is sold under contracts which require the purchasers to pay a price related to those quoted in the market journals.

(3) That the defendants conspired to falsify the market journal quotations by agreeing (a) to purchase gasoline from independent refiners (a type of transaction which would not involve sales to jobbers and so would not ordinarily be reflected in the market journal quotations); (b) to pay the independent refiners higher prices than those being paid by jobbers; and (c) to have the higher prices so paid misrepresented in the market journals as prices being paid by jobbers.

Thus the indictment plainly reveals a single plan or scheme to fix the published spot tank car market price of gasoline. If any one of the three steps described in paragraph (3) above is eliminated from the scheme, then necessarily it would not accomplish the object for which it was formed.

In this case the Government failed completely to establish the allegation that the respondents (1) bought gasoline at prices higher than those paid by jobbers in the competitive spot market, and (2) fraudulently misrepresented and published such prices in the market journal quotations as prices paid by jobbers. The proof affirmatively showed the contrary. It showed that the market journals had made no misrepresentation. It showed that they had published the prices paid by jobbers, not the prices paid by respondents, and that the latter prices were in fact prevailingly below the price currently being paid by jobbers. Thus the Government failed to sustain the charge of an illegal scheme to fix the published tank car spot market quotations for gasoline.

This failure of proof constituted a fatal variance as a matter of law. In addition the respondents were materially prejudiced. (See pp. 293-8, *infra*.)

VII.

The record contains no substantial competent evidence that the combination either in purpose or effect unreasonably restrained trade within the meaning of the Sherman Law.

The record shows that for several years prior to the indictment period the distress of the oil industry was so

acute as to call for remedial concerted action. It also shows that this condition was recognized not only by the industry, but by the state and federal governments. There was no dispute as to these facts.

The situation just described was caused primarily by two abnormal and destructive competitive practices. The Circuit Court of Appeals summarized the effect of these practices as follows: "If there is any one thing completely established, it is that the oil industry as well as numerous Governmental agencies, federal and state, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable but necessary if the industry was to survive, to say nothing of prospering" (R. 3929).

Faced with these conditions the respondents engaged in a voluntary cooperative effort to remove one of these competitive evils—distress gasoline. The nature of their agreement and of its effect were summarized by the Circuit Court of Appeals as follows:

> "Without going into detail • • • we think the substance of what was accomplished and agreed upon was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices." (R. 3919.)

Upon such a record, the respondents were entitled to directed verdicts of acquittal.

The Circuit Court of Appeals erred as a matter of law in holding that the reasonableness of the activities of the defendants was a jury question solely because the plan was "placed in operation with the results revealed." A plan or agreement which has been put into operation may be as unobjectionable as one which is still executory. In

either case the question on appeal is whether the facts and circumstances are as consistent with the innocence of the defendants as with their guilt.

The Government in its brief points to no substantial competent evidence which would sustain any other conclusion as to the nature and effect of respondents' agreement.

VIII.

To establish venue in the Western District of Wisconsin, the Government claims that certain acts done within that District were *overt in nature.*

The record shows that the only acts done within the Western District of Wisconsin in this case were (a) the execution of contracts with jobbers whereunder the price was determined by reference to the spot tank car market quotations in the market journals; (b) delivery of gasoline to jobbers under such contracts; and (c) sales to retail dealers and consumers at prices which were affected by prices on the spot tank car market.

An overt act must be an act done within the scope of the agency created by the illegal "partnership" or conspiracy agreement.

The Government and two judges of the Circuit Court of Appeals state that an agreement among the respondents to sell only on the spot market quotations necessarily arises by implication. They argue that since the purpose of respondents' purchases on the spot market was to raise the general level of the wholesale and retail prices in Wisconsin, an agreement to base all such sales upon the enhanced spot market prices must be implied. The argument thus advanced flies in the face of all the affirmative

testimony in the record. There is nothing in this record to show that the agreement among the respondents contemplated any restriction upon their freedom in selling gasoline within the Western District of Wisconsin.

Moreover, it is not true that unless the respondents had an express or implied agreement to sell gasoline in the Western District of Wisconsin solely upon the spot market that they would have engaged in a philanthropic endeavor. The mere removal of distress gasoline from the competitive market would obviously result in a more normal price not because of the absence of competition, but by reason of it. The undisputed testimony is that this was all the respondents hoped to accomplish, and the record shows that in fact this was all that resulted.

ARGUMENT

PART ONE

THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE RESPONDENTS WERE ENTITLED TO NEW TRIALS.

I.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY (A) INSTRUCTING THE JURY TO RETURN VERDICTS OF GUILTY IF THE COMBINATION AMONG RESPONDENTS HAD THE POWER AND PURPOSE TO CONTRIBUTE IN ANY DEGREE TO THE RISE IN GASOLINE PRICES, WITHOUT REGARD TO WHETHER THE COMBINATION COULD EFFECT OR HAD EFFECTED AN UNDUE RESTRAINT UPON COMPETITION, AND (B) BY IMPROPERLY LIMITING THE EXTENT TO WHICH THE JURY COULD CONSIDER THE FACTS AND CIRCUMSTANCES SURROUNDING THE RESPONDENTS' ACTIVITIES.[1]

At the close of the evidence the trial court was under the duty to explain clearly to the jury the applicable law and the issues which the facts and the law raised for determination.

From the time of their opening to the jury the respondents had taken the position that, regardless of what the

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[1]The error in the court's instructions was raised in the Circuit Court of Appeals by Assignments of Error Nos. 42 and 43 (R. 2552, 2553). The court's refusal to give instructions requested by the respondents was raised by Assignments of Error Nos. 46, 47, 48, 49, and 56 (R. 2555, 2556, 2560, 2563, and 2568). The Circuit Court of Appeals sustained the respondents' contention (R. 3941), and the Government raised the issue in this Court as the first and "principal" question presented by its petition in No. 346. (Pet. 2.)

Government might claim was the effect of their activities on price, they had not unreasonably restrained competition. On the contrary, they contended, the effect of their activities had been to free, rather than to destroy, competition. The respondents had conceded at the outset (R. 159) that they had engaged in concerted action to buy distress gasoline from independent refiners and that they had realized that this might contribute[2] to a rise in the price. It was their contention, however, that the normal play of competition in the industry was being obstructed and distorted by competitive abuses which had driven the tank-car price of gasoline below the cost of production. One of those abuses was the forced sale by independent refiners of surplus or distress gasoline. This distress gasoline (together with "hot oil") tended to depress the competitive price of the spot tank car market *abnormally*. This abnormal lowering of the tank-car price, in turn, threatened to destroy the conservation price level of crude oil, which the Government and the industry were trying to secure. It pulled down the tank-car price of gasoline at the refinery below the cost of production, and threatened to wipe out one of the most important competitive elements in the industry—the non-integrated refiners. It caused retail price wars which both the Government and the industry were anxious to eliminate. It was the contention of the respondents that their concerted buying of distress gasoline had freed competition

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[2]There was never any contention that the respondents' activities were solely responsible for the price rise. The Government in its summing up expressly admitted that factors other than the respondents' purchases had contributed to the rise and stabilization of price (R. 2063-4). The evidence which the jury had before it was undisputed to that effect.

from these destructive tendencies and that it had had no other effect upon price than was normally to be expected from this legitimate action. And it was their contention that this purpose and effect did not constitute an undue restraint of trade or a violation of the Sherman Law.

The facts upon which these contentions were based are established by substantial competent evidence in this record. The Government expressly concedes that there was a "wealth of evidence" from which inferences favorable to the respondents could be drawn (B. 147). In its petition for certiorari it conceded that the respondents' evidence tended to show:

> "(1) That they did not combine for the purpose of controlling prices;
>
> "(2) That their purchasing activities were confined to distress material, the removal of which did not suppress normal competition on the spot market" (Pet. 14).

The Government, however, took the position before the jury that if the respondents' concerted action had even contributed to the rise in price—if it had "affected the price one iota"[3]—then *as a matter of law that concerted*

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[3]At the close of the opening statement to the jury by Mr. Chaffetz, and in the presence of the jury, the following colloquy occurred:

> Mr. Donovan: May it please the Court, the counsel, in his opening, stated this, as I understood it—and if I am wrong, I wish you would correct me: That if this agreement which he alleged took place affected the price one iota that it was a violation of the law.
>
> I ask the Court to instruct the jury to disregard that statement as being an incorrect statement of the law.

action was an unreasonable restraint of trade. According to the prosecution, it was immaterial whether the higher price level had continued to be determined, largely or preponderantly, by the play of competitive sales on the spot market. It was immaterial whether or not there had been a competitive abuse, or whether its removal had helped to maintain the conservation price level of crude oil, preserve the independent refiners, and prevent retail price wars. It was enough that the concerted action taken by the respondents had affected the price an "iota".

These opposing contentions raised a clear cut issue. If the prosecution was right in its contention, then clearly the duty of the jury was a simple one to perform. The respondents had proclaimed the fact of their concerted action. They had conceded that this concerted action had contributed to the rise and stabilization of prices which had taken place. If the prosecution was right about the law, then there was nothing for the jury to do but to return a verdict of guilty.

This was the situation before the jury when the court

Mr. Chaffetz: If the Court please, I think that that is an exact statement of the law, and it was not an oversight. I made that statement deliberately. I am willing, in order to leave no erroneous impression with the jury, that the Court instruct the jury, that that is only my statement of the law, and not the Court's statement of the law.

Mr. Donovan: Then I ask the Court, so that there will be no misunderstanding or no misapprehension in the minds of the jury, the correct statement of the law be made to them at this time.

* * *

The Court: The Court will instruct the jury as to the law.

Mr. Donovan: Exception. (R. 113.)

The same contention was made by the Government in closing arguments. (R. 2045.)

delivered its charge. What was the jury to understand on this question by the instructions which were then given? Were they such as would naturally or inevitably appear to them to approve and confirm the Government's contention?

It seems inescapable that the net effect which a jury would get from that charge, with the issues drawn as they were by the Government and the respondents, was this:

(1) If the respondents were doing a substantial amount of trade in gasoline—which of course they were; and

(2) if they combined—which of course they did; and

(3) if by that combination they had the power and purpose to contribute to securing a rise in price—as to which there was no dispute—; and

(4) if the price did rise—as to which there was no conflict;

then, *regardless of the effect, if any, which the combination had had upon competition*, the respondents had violated the law and should be found guilty.

This was what the Government had dinned into the jury's ears since the opening of the trial. It was what the trial judge reiterated.

Once a power and purpose to raise price was found, the jury was excluded from any consideration of whether or not there was a competitive abuse which constituted an abnormal depressing influence upon price. It was excluded from any consideration of whether that power and purpose went beyond bringing about the rise in price which would naturally flow from the removal of an ab-

normal depressing and distorting factor. It was excluded from any consideration of whether or not the combination had, or could have had, any effect beyond freeing competition from the abnormal depressing effect of forced sales.

The Government, in its brief, denies that such was the fair import of the charge. We shall, therefore, first discuss the nature of the charge.

A. The trial court erroneously instructed the jury to return verdicts of guilty if the respondents' concerted action had contributed to any extent to an increase in gasoline prices without regard to whether it had effected an undue restraint upon competition.

The charge of the trial court confirmed the claim which the Government had repeatedly made in its opening and closing arguments, namely, that the respondents were guilty as charged if their activities had contributed "by an iota" to an increase in gasoline prices. Contrary to the decisions of this Court, the charge assumes that a combination having a purpose to affect and raise prices is unlawful under all circumstances, without regard to whether or not the means employed are such as to effect an undue restraint upon competition, or are lawful means. It makes no attempt to distinguish between a combination such as that involved in the *Appalachian Coals* case[1] and a combination such as was before this Court in the *Trenton Potteries* case,[2] where the parties substituted an agreed-on price for one determined by competition. Under the charge

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[1] *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933).

[2] *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927).

the sole test by which guilt or innocence was to be determined was the presence or absence of an effect on price.

The instructions complained of were neither isolated nor inadvertent. They were repeated no less than twelve times.

The trial court instructed the jury that:[3]

> "• • • It is illegal and a violation of the Sherman Law for a group of individuals or corporations, or both, to act together to *raise* the prices to be charged for the commodity which they manufacture, where they control a substantial part of the interstate trade and commerce in that commodity." (R. 2404-5).

And further:

> "• • • If you find that a combination existed and that such combination had the power to *raise* the price, the amount by which prices may have been affected by the combination is not important under the law." (R. 2405).

And further:

> "You will also understand that if you find an illegal combination to have existed among all or some of the defendants, having for its purpose the *raising* of prices, it does not matter that there may have been also other factors which contributed to the raising of the prices, as for example, the existence of the Connally Act, • • •" (R. 2405).

And further:

> "Furthermore, if you find that the defendants combined and conspired to *raise* the sale prices of

[3]Italics supplied.

their gasoline, any good intentions which they might have had in what they did will not make their understanding or combination legal, or excuse them from the consequences of their acts, and it does not matter how helpful or beneficial such illegal activities may have been to the defendants or to the independent refiners, or to any other class of persons * * *" (R. 2407).

And further:

"An understanding on the part of the members of a combination controlling a substantial part of an industry to *raise* the price which the members are to charge for their commodity is, in and of itself, an undue and unreasonable restraint of trade and commerce, * * *" (R. 2407).

And further:

"* * * The law condemns the exercise by any combination of the power to *raise* prices. And so, as I have stated, if you find a combination and that the members of the combination had the power to *raise* the price, and acted together for that purpose, then I charge you that the combination is illegal, and your verdict should be guilty as to each defendant whom you find to have knowingly participated therein." (R. 2407).

And further:

"If you come to the conclusion from the evidence in this case that these defendants possessed the power to *raise* the price of gasoline to be sold in the ten Middle Western States, and that there was the purpose to exert that power, then the combination became, from the time that this purpose appeared,

an illegal one, and a conspiracy in restraint of trade, and the defendants participating therein are guilty of the offense charged in the indictment." (R. 2409).

And further:

"If, from all the evidence before you, you find not only that there was concerted action, that is, action together, of the defendants, but that it sought to accomplish the illegal purpose of *raising* the price of gasoline to any extent, then it would follow that the acts and declarations of any one or more of the conspirators in furtherance of the conspiracy are binding upon all the others, * * *" (R. 2409).

And further:

"* * * It is sufficient that the circumstances shown satisfy you to the extent I have indicated, that the parties thereto were acting together toward a common end, and that that end was the *raising* of prices charged as the object of the alleged conspiracy." (R. 2411).

And further:

"However, if you should find that through the purchase of so-called distress gasoline, defendants and the independent refiners and others acting in co-operation with them had the power, and combined for the purpose of directly *affecting and raising* the level of spot market prices, then, as I have previously stated, the restraint of trade was as a matter of law undue and unreasonable and, therefore, illegal." (R. 2415).

And further:

"* * * Whether or not such was an objective of the Code, the defendants would not be justified

> in combining with others to *raise* the price of gasoline, assuming that they had the power to do so, unless their activities in this regard were specifically authorized by the Code or approved by the President of the United States or the Secretary of the Interior under the National Industrial Recovery Act * * *" (R. 2415).

And further:

> "* * * No inference unfavorable to any of the defendants could be drawn from the mere fact that some of them purchased gasoline through the East Texas Refiners' Marketing Association, provided they acted independently of each other, but if they acted together, in concert, for the purpose of *raising* the price as alleged in the indictment, then their activities would be illegal." (R. 2420).

The instructions quoted above compelled the jury to return verdicts of guilty if it found that the respondents had "contributed to the raising of price" *by one iota.* It is impossible to claim as the Government does (B. 64) that the jury must have found the respondents solely responsible for the increase and subsequent stability in price. For, the trial court also instructed the jury:

> "You will also understand that if you find an illegal combination to have existed among all or some of the defendants, having for its purpose the raising of prices, *it does not matter that there may have been also other factors which contributed to the raising of the prices, as, for example, the existence of the Connally Act,* * * *" (R. 2405. Italics supplied).

All of these statements of the court to the jury must be read in the light of the issue as it had then been narrowed

and presented by the Government and the respondents. From the Government's standpoint, any concerted action in buying which affected price one "iota" was unlawful. The respondents' position was that the combination was not unlawful if it affected prices merely by freeing competition from an artificially depressing obstacle. The court's charge clearly indicated to the jury that the court accepted the Government's contention and rejected the respondents'.

The Government now seeks to shift its ground and escape from the consequences of its success in persuading the trial court into error by saying that the trial court meant something different from what it said. It resorts to the fact that in a few instances the court in its charge added the word "fix" or "fixing" in either the disjunctive or conjunctive, without discrimination, to the words "raise" or "raising" (B. 63, n. 1). Apparently, it is the Government's argument that through the occasional use of the word "fix" or "fixing" the jury understood that they were to apply some stricter test than that authorized by the court's reiterated use of the word "raise". The court in its charge did not explain to the jury what it meant by "fix" or "fixing" as distinguished from "raise" or "raising". Indeed, it is quite apparent that the two sets of words were used indiscriminately. Thus the net effect of the court's charge is precisely to the contrary of what it ought to have been, it being clear that the most careful discrimination between "fix" and "raise" was necessary in order that the jury might distinguish between an illegal situation of the character presented by the *Trenton Potteries* case and a legal situation of the character presented by the *Appalachian Coals* case. Much more, indeed, than mere verbal

differentiation between the two sets of words was necessary. It is plain that the jury should have been carefully instructed as to the tests to be specifically applied in order to distinguish between the two situations.

As stated by the Government (B. 62-63): the jury was instructed that "before returning a verdict of guilty as to any defendant it must find that the evidence established beyond a reasonable doubt all the material and essential allegations of the indictment;" the trial judge quoted from the indictment to show that the defendants were accused of combining for the purpose of *raising and fixing* gasoline prices in the Mid-Western area; and on the allegation of venue the jury was required to find beyond a reasonable doubt that the defendants had conspired together for the purpose of artificially *raising and fixing* "spot market prices and the price of gasoline in the Mid-Western area as charged in the allegations of the indictment." Then, however (R. 2404), *in defining the material allegations of the indictment*, the court said:

> "Now, what must you find before you may conclude that the Sherman Act has been violated? It is illegal and a violation of the Sherman Law for a group of individuals or corporations, or both, to act together to *raise* the prices to be charged for the commodity which they manufacture, where they control a substantial part of the interstate trade and commerce in that commodity.
>
> "If you find that the defendants, and those acting in concert with them, controlled the greater part of the gasoline sold in the ten Middle Western States, and had the power to raise the price of that gasoline, and that the defendants and these other persons acting with them have knowingly engaged

> in a combination to *raise or* fix the price to be charged for gasoline to jobbers or consumers in the Mid-Western area as charged in the indictment, then *you will understand that these defendants have violated the Sherman Act and are guilty as charged in the indictment.*" (Italics supplied.)

Here in unmistakable language the jury is instructed that a combination to raise prices is unlawful and that proof of a combination to raise prices is sufficient to satisfy the allegations of the indictment and to compel conviction.

The Government's argument concedes the failure of the trial court to discriminate between "raise" and "fix" (B., 63, footnote). It asserts, however, that the court must be assumed to have employed some stricter standard inherent in the meaning of the word "fix", that is, that it must have understood the word "raise" to mean the same as the word "fix". Such a contention is not only without foundation but beside the point. It was the bounden duty of the trial court, as we have shown, to carefully discriminate between the two concepts, and the only question we are considering is the minimum finding which the jury was authorized to make under the court's instructions. In twelve different places it had been told that the guilt or innocence of the respondents was to be determined solely by reference to the question of whether or not their concerted activities had contributed to any extent to an increase in prices, without regard to whether the combination had effected an undue restraint upon competition. The sporadic use of the word "fix" or "fixing" in the charge cannot conceivably affect the situation.

The Government apparently now concedes that on this

record it was the duty of the jury to consider: (1) whether distress gasoline was a competitive evil; (2) whether the concerted buying was directed toward the removal of that evil; (3) whether during that buying the spot market price continued to be largely or preponderantly determined by the play of competition; (4) whether the buying by respondents did more than free competition from the abnormal depressant effect of forced sales and (5) whether, in view of existing and latent competition from active competitors of respondents it would have been possible for the latter arbitrarily to fix and control prices. Apparently the Government also now concedes that if these questions had been answered by the jury favorably to the respondents, the latter would have been entitled to verdicts of not guilty. (See B. 62-66, 74-75.)

The Government seeks to escape from the effect of these concessions by claiming (B. 84) that all these questions *were* submitted to the jury and decided *adversely* to the respondents. In view of the character of the charge there is no justification whatever for that claim. Indeed, as will presently be pointed out, the jury was affirmatively told *not* to consider the evidence bearing upon any of these matters, that is, the surrounding facts and circumstances, unless it *first* found that the defendants did *not* have the power to raise price and did *not* combine for that purpose (R. 2414, pp. 163-7, *infra*). That the court regarded every combination which contributes to an increase of prices as "price fixing", as it loosely used the term, and indeed as it had been used by the prosecution throughout the trial of the case, is clear from reading the charge in its entirety. It is emphasied by the following excerpt:

> *"The law condemns the exercise by any combination of the power to raise prices, and so, as I have stated, if you find a combination and that the members of the combination had the power to raise the price, and acted together for that purpose, then I charge you that the combination is illegal and your verdict should be guilty as to each defendant whom you find to have knowingly participated therein."* (R. 2407. Italics supplied.)

It is clear that the jury was required to find only that the respondents through their purchase of the distress gasoline affected the market price by raising it.

Even if we accept the Government's contention that the trial court occasionally gave a correct instruction, this would not cure his persistent errors. There would remain a serious conflict in the instructions which must necessarily have confused and misled the jury; irrespective of the fact that it was forbidden to consider the vital evidence with respect to the circumstances surrounding the respondents' activities. The Government itself argues that the instructions confused and misled the Circuit Court of Appeals. Its principal argument (B. 84) is based, not upon the theory that the Circuit Court of Appeals misapprehended the law, but on the ground that it misunderstood and misinterpreted the instructions of the district court.[4] If after a careful and deliberate study of the record and the charge, three judges of the Circuit Court of Appeals "misunderstood" the meaning of the instructions to the jury, how can the Government now ask this Court to find that the jury in the

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[4]See also page 18 of the Government's petition for certiorari in No. 346 where it states that the Circuit Court of Appeals "misunderstood the scope of the issues submitted to the jury by the trial court's instructions."

heat and the pressure of the trial did not likewise misunderstand the instructions. Apparently, the charge was also misleading and confusing to the Government. It now argues that the district court "charged the jury that if it found that the defendants combined for the purpose of raising and fixing gasoline prices in the manner set forth in the indictment, and if it found that they had the power so to raise and fix prices, a restraint imposed by their combination would be unlawful and unreasonable" (B. 50). Emphasizing the word "fixed", it argues that the instruction required the jury to find a "price fixing agreement" within the meaning of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. In its petition, however, it summarized the charge differently, as follows: The "trial court instructed the jury that if it found that the defendants had the power to raise gasoline prices and had combined for that purpose, the restraint of trade was unreasonable and illegal" (Pet. 2). The word "fix", which it now emphasizes, was there omitted. Obviously, if the instructions were misleading, not only to the Circuit Court, but to the Government itself, they could not have been clear to the jury. Thus, even if we could accept the Government's present view of the instructions, the verdict of the jury cannot stand by reason of the principle laid down in *District of Columbia* v. *McElligott*, 117 U. S. 621, 630 (1886), where this Court said:

> "• • • The charge was inconsistent with the instructions previously given, and was calculated to mislead the jury, for it submitted to them a question

which those instructions had, in effect, if not in terms, declared to be immaterial in the case.'"[5]

B. The instructions of the trial court compelled the jury to return verdicts of guilty even though it found that "respondents' purchasing activities were confined to distress material, the removal of which would not suppress or unduly affect normal competition on the spot market."

The jury was thus instructed to return verdicts of guilty if it found that the respondents' activities had contributed in any degree to a *rise* in gasoline prices, without regard to the effect of their combination on competition. The wholly erroneous character of these instructions appears at once when we examine the evidence.

The respondents contend, at pages 299 to 327, *infra*, that the record contains *no* substantial competent evidence that their activities unreasonably restrained trade. At pages 9 to 112, *supra*, and in Appendix A, they have set forth summaries of the evidence which, they believe, fairly establish that fact. For present purposes, however, no such exhaustive analysis of the evidence is necessary. In testing the instructions of the trial court, the respondents need only show that it was *fairly possible* for the jury to conclude that their activities had not unreasonably restrained trade.

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[5] In accord are:

Ward v. *Cochran*, 150 U. S. 597, 610 (1893); *Erhardt* v. *United States*, 268 Fed. 326 (C. C. A. 7th, 1920); *McLean Medicine Co.* v. *United States*, 253 Fed. 694, 696 (C. C. A. 8th, 1918); *Kuhn* v. *United States*, 42 F. (2d) 210, 211 (C. C. A. 3rd, 1930); *Degroot* v. *United States*, 78 F. (2d) 244, 253 (C. C. A. 9th, 1935).

Applying this test, the respondents believe that no one can dispute the existence of competent and substantial evidence in the record which would support the following inferences:

(1) That the only thing which the respondents agreed to do or did was to take concerted action to eliminate distress gasoline;

(2) That distress gasoline was a "competitive evil"—that is to say, a factor which tended to impair or destroy normal competition.

(3) That the respondents' activities neither fixed nor controlled prices nor unduly affected the play of normal competition; that they affected prices only in the sense that the removal of the competitive evil of distress gasoline permitted prices to rise to a normal competitive level; and that competitive forces over which they had no control were such that the concerted buying which they did or agreed to do had no power to do more.

There is certainly substantial evidence that the respondents' combination was a program to purchase distress gasoline from independent refiners. The Circuit Court of Appeals concluded that,

> "the substance of what was accomplished and agreed on was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices". (R. 3919).

We believe that there can be no serious dispute that the evidence establishes that distress gasoline in the hands

of independent refiners had been a competitive evil which had driven the price of gasoline below the cost of production. We further assert that there is no evidence in the record in conflict with this conclusion. But, in any event, no one can deny *that the record contains substantial evidence* that distress gasoline was a competitive evil which threatened the petroleum industry. As the Circuit Court of Appeals said:

> "• • • If there is any one thing completely established, it is that the oil industry, as well as numerous Governmental agencies, Federal and State, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable, but necessary, if the industry was to survive, to say nothing of prospering • • •" (R. 3929).

We further believe that there is no competent or substantial evidence that the respondents' activities either fixed or controlled prices by unduly affecting the play of normal competition. But again, no one can deny that there is at least substantial evidence to the contrary. *Even the Government concedes that there was at least evidence which entitled the jury to find that the respondents had affected prices only in the sense that their removal of the competitive evil of distress gasoline had permitted prices to rise to a normal competitive level.* In its petition for certiorari in this case the Government said:

> "• • • The defendants, on the other hand, offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to 'distress' material and removal of which

> did not suppress normal competition on the spot markets; * * *" (Pet. 14)

Again in its brief the Government makes clear that there was:

> "* * * certain evidence which, if the jury had given it controlling weight, would have supported certain findings contrary to those which the jury actually made. All that this showing established was that there was a wealth of evidence from which opposing factual inferences might have been drawn" (B. 147).

Let us apply the instructions of the trial court to the evidence just described. That evidence undoubtedly exists. Undoubtedly it is competent and substantial, and would have justified the jury in drawing the conclusions indicated above. If the jury *had* drawn those conclusions, it would have found that the respondents had merely engaged in concerted action to eliminate "a recognized competitive evil", the removal of which would tend to promote rather than to impair competition. It would have found that the respondents' activities had neither fixed nor controlled prices:—that they had affected prices only in the sense that their removal of the competitive evil had permitted prices to rise from a sub-normal level to a somewhat higher level determined by the free play of normal competition. *Under the instructions of the trial court,* however, if the jury had made these findings it would have been compelled to return verdicts of guilty. Once it found that the respondents' activities had contributed in any way to a rise in prices, then it was compelled to find, in the language of the trial court, "that these defendants

have violated the Sherman Act and are guilty as charged in the indictment" (R. 2404).

The Government's brief states (B. 84) that this Court is precluded by the findings of the jury from testing the charge of the trial court in the light of the evidence that the combination was one to eliminate a competitive abuse. It attacks the conclusion of the Circuit Court of Appeals that the charge constituted reversible error upon the same grounds:

> "The court's assumption that in the case at bar the combination was simply 'an agreement to raise or fix prices by the elimination of a competitive abuse', is contrary to the findings which the jury necessarily made when it convicted the defendants. Under the trial court's instructions to the jury it was required, in order to convict the defendants, to find that they had combined both for the purpose of raising and fixing spot market prices and for the purpose of thereby raising the prices at which they sold gasoline in the Mid-Western area. In other words, the jury found that price raising and price fixing, as such, was the *primary* objective of the conspiracy" (B. 84).

This argument ignores the fact that the jury was instructed to return verdicts of guilty even though it found nothing more than that the combination had had an effect on price, regardless of whether it had effected an undue restraint upon competition. This being so, the only fact which the jury can be said to have found by returning verdicts of guilty is that the respondents had the purpose and power to raise prices. Jury findings are based upon the instructions of the trial court. Obviously if the jury

receives improper instructions no findings which it makes can cure the error in those instructions. This Court, therefore, will test the charge of the trial court in the light of the facts which the jury might have found.

We turn to the question of whether, tested in that light, the instructions were correct.

C. The test of legality under the Sherman Law is the effect of the concerted action upon free competition, not the effect upon prices irrespective of whether or not competition has been unduly restrained.

No decision of this Court has ever held, or we believe even intimated, that a combination is illegal merely because its purpose or effect is to raise prices. On the contrary, and without exception, the decisions of this Court hold that the purpose of the Sherman Law is to preserve competition by preventing its undue restraint, and that the legality of a combination is to be determined in the light of its intended or actual effect on competition.

United States v. *American Tobacco Co.*, 221 U. S. 106 (1911);

United States v. *Union Pacific Railroad Co.*, 226 U. S. 61 (1912);

Nash v. *United States*, 299 U. S. 373, 376 (1913);

American Column & Lumber Company, et al. v. *United States*, 257 U. S. 377 (1921);

Charles A. Ramsay Co. v. *Associated Bill Posters of the United States and Canada, et al.*, 260 U. S. 501 (1923).

This rule of law was completely ignored by the trial court. By the charge, the jury was forbidden to consider

whether the effect of the combination upon competition constituted an undue restraint. Instead, the sole test which it was permitted to apply was whether the combination had the power and the purpose or effect of raising prices.

The rule of law, which the trial court refused to follow in this case, has nowhere been more forcefully stated than in the dissenting opinion of Mr. Justice Brandeis in *American Column and Lumber Company* v. *United States*, 257 U. S. 377 (1921) as follows:

> "* * * The illegality of a combination under the Sherman Law lies not in its effect upon the price level, but in the coercion thereby effected. * * *
>
> "The cooperation which is incident to this Plan does not suppress competition. On the contrary it tends to promote all in competition which is desirable.* * *" (257 U. S. at 417-8).[1]

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[1]The majority opinion in the case adopts the same view of the law.

> "It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce falls within the condemnation of the act and is unlawful." (*Ibid*, 400.)

Similarly in *Standard Oil Company* v. *United States*, 221 U. S. 1 (1911), the case which first announced the "rule of reason," this Court indicated that the Sherman Law condemns a combination only when the enhancement of prices is brought about through the elimination of competition.

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs *which it was thought would flow from the undue limitation on competitive conditions* caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating

That an undue restraint on competition, and not mere effect on price, is the test of legality, is shown by the case of *Maple Flooring Manufacturers Association* v. *United States*, 268 U. S. 563 (1925). That case concerned the legality of a combination to gather and disseminate information and statistics covering various items in the maple flooring industry. The combination among the defendants was admitted. There was evidence in the record tending to show that the effect of the combination was to stabilize prices and to produce fairer price levels. The lower court found that the combination tended "to increase prices" (268 U. S. at 565). Upon that record the Government in its brief contended that the combination was illegal because "it is sufficient to prove the adoption of a plan or scheme, which in its operation necessarily affects prices * * *."[2] The opinion of this Court expressly stated that the case turned upon the issue thus presented. (*Ibid*, 568.) It sustained the conclusion of the court below that the defendants' activities would tend to raise prices. It rejected, however, the view that such activities were illegal, saying:

> "It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. * * * But the

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as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, * * *." (221 U. S. at 58.)

[2]In the Supreme Court of the United States, October Term, 1924, No. 342, *Maple Flooring Manufacturers Association, et al.* v. *United States*, reply brief on behalf of the United States, p. 182.

> natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful." (*Ibid*, 582).

See also:

> *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588, 603, 604 (1925).

In view of these authorities it is impossible to contend that the Sherman Law forbids all combinations which have the effect of raising prices merely because of the effect of such combinations on price and without reference to whether the combination would effect an undue restraint on competition. As Mr. Justice Brandeis said in the *Chicago Board of Trade* case, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. * * *" (246 U. S. at 238).

The reason for this rule is clear. Many combinations which tend to raise or stabilize prices *promote* rather than *impair* fair competitive opportunities. Let us take a single illustration. Assume that a concern conducting a nation-wide business is engaged in carrying on destructive price wars against its competitors. The very act of engaging in such practices may constitute a violation of the Sherman Law. If so, an agreement between the company and its competitors to abandon such illegal activities is obviously

not condemned by the law. Yet the result and purpose of such an agreement is to raise prices by eliminating the destructive practices which have abnormally depressed prices. Measured by the court's charge, such an agreement not to violate the Sherman Law would be illegal solely because of its effect on prices. But that is not the law.

This Court considered that identical proposition in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 177 (1911). In that case the Government urged that the Sherman Law condemned all agreements which restricted competition without regard to whether the restraint was unreasonable or not. The position of the Government was summarized by this Court as follows:

> "* * * Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war.* * *" (221 U. S. at 177).

This Court rejected this contention, saying that it grew "out of a plain misconception of both the letter and spirit of the Anti-Trust Act" (*Ibid*, 178).

Repeatedly since 1911 this Court has reaffirmed the position it took in the *American Tobacco* case. Repeatedly it has had to pass upon cases in which defendants have combined for the purpose of eliminating or mitigating some form of unfair competition or competitive abuse. Re-

peatedly, such combinations have been sustained, in spite of the fact that one effect of the defendants' activities would necessarily be to raise and stabilize prices.

Chicago Board of Trade v. *United States*, 246 U. S. 231, 238 (1918);
Window Glass Mfrs. Assn. v. *United States*, 263 U. S. 403, 413 (1923);
Maple Flooring Mfrs. Assn. v. *United States*, 268 U. S. 563, 582 (1925);
Cement Manufacturers Protective Assn. v. *United States*, 268 U. S. 588, 604, 606 (1925);
Standard Oil Co. v. *United States*, 283 U. S. 163, 175, 179 (1931).

Again, in *Appalachian Coals* v. *United States*, 288 U. S. 344 (1933), this Court upheld the legality of an exclusive sales agency in the coal industry, it appearing that the purpose of the combination was to eliminate competitive abuses.

As stated by this Court in the *Appalachian* case "the challenged combination lies in the creation by the defendant producers of an exclusive selling agency." That combination embraced 137 bituminous coal producers, and they conferred upon their common selling agency the sole power to determine the prices at which their coal should be sold. This Court thereupon thus stated not only the contention of the Government, but the finding of the district court:

> "The contention is, and the court below found, that while defendants could not fix market prices, that concerted action would 'affect' them, that is, that it would have a tendency to stabilize market

> prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade.* * *" (288 U. S. at 373-374).

The opinion in the *Appalachian* case shows that there is a striking similarity between the conditions in the coal industry which the defendants in that case set out to cure, and the conditions in the oil industry which respondents in the case at bar undertook to cure.

> "This unfavorable condition [of the coal industry] has been aggravated by particular practices. One of these relates to what is called 'distress coal'. The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be pre-

pared without making several sizes. According to the finding of the court below, one of the chief problems of the industry is thus involved in the practice 'of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes.' Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of 'distress coal' presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity" (*Ibid*, 362-363).

Let us compare the two cases, the *Appalachian* case and the one at bar. In each case a "distress" product adversely affected the market. In each case the agreement involved cooperative action which would tend to stabilize or even raise existing prices. In the *Appalachian* case the agreement was held to constitute a reasonable restraint upon trade. In the case at bar, the jury was instructed that an agreement to raise prices or resulting in the raising of prices is *per se* illegal, without regard to the effect of the combination on competition. The error in that instruction as applied to the evidence is therefore plainly revealed by the disposition made of the *Appalachian* case.

The basic question in each case is the same. It is not merely whether "fairer," that is, higher prices, have been sought, but the manner in which those prices have been brought about. That test, applied in the *Appalachian* case, was again stated to be the fundamental law in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 597-598 (1936), the most recent case involving a combination of competitors to reach the Supreme Court.

> "• • • Designed to frustrate unreasonable restraints, they do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law." (297 U. S. at 597-8.)

The Government argues that the *Sugar Institute* case, rejected the principle that there may legally be concerted action to remove abuses if the effort is confined to what is necessary to remove the abuse and competition is merely freed from the effects of the abuse (B. 75-6).

Contrary to the contentions of the Government, however, it is clear that the *Sugar Institute* case is in complete accord with the *Appalachian* case. In that case, the defendants agreed, not only to publish their prices, but *not to depart from the prices so published* without at least a day's notice (297 U. S. at 580, 582). They further agreed *to refrain entirely* from certain types of transaction (*Ibid.* 591). This Court found these agreements to be entirely unnecessary to obtain the abolition of secret

rebating. A mere agreement for the open publication of prices would have obtained that result.

On page 578 this Court said: "The court found that the defendants 'in most of their activities' had 'gone much further than was reasonably necessary to accomplish their professed aims of eliminating fraud, waste and secret, unfair or illegal discrimination' ". On page 591 it said: "The court found that defendants' action went further than was necessary to prevent secret rebating and amounted to unreasonable restraints." This Court approved both of these findings.

In the instant case, however, as we have shown, the jury was fully entitled to find that the respondents' concerted action went no further than was necessary to remove the abuse of "distress" gasoline; that the respondents' agreement was strictly confined to the attainment of that end;[3] that in confining their buying to "distress" gasoline at "fair going market prices" established in sales by independent refiners to jobbers, the respondents took no action "to fix and maintain arbitrary and unreasonable prices," or "to fix monopoly prices" (*cf. Appalachian Coals* v. *United States*, 288 U. S. 344, at 373 [1933]); that the respondents' activities had no effect whatever upon prices except the effect which would naturally follow from the removal of the competitive abuse; and that the combination did not remove the ordinary basic competitive factors governing the spot market.[4]

The opinion in the *Sugar Institute* case concludes

> "* * * Nor does the fact that the correction of abuses may tend to stabilize a business, or to pro-

[3] See pp. 40-5, *supra*.
[4] See pp. 46-51, *supra*.

duce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. * * *" (*Sugar Institute* v. *United States*, 297 U. S. 553, 598 [1936]).

* * *

The respondents submit that the controlling principles to be deduced from the cases we have discussed may be summarized as follows:

(1) Forced sales of a distress product which contribute substantially to the depressed condition of an industry constitute a competitive evil. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 362-3 (1933).

(2) An intention 'to stabilize the business' or to produce fairer price levels,' through the elimination from a competitive market of a competitive evil (such as distress gasoline) is not unlawful. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 373-4 (1933); *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 597-8 (1936); *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563, 582 (1925); *Cement Manufacturers Protective Assn.* v. *United States*, 268 U. S. 588, 604, 606 (1925).

(3) An effort to correct such a competitive abuse is promotive of sound competition and not condemned by the law unless by reason of its intent, inherent nature or effect it goes beyond what is necessary to correct the abuse, and, instead of merely freeing competition from the effect of that abuse, it unreasonably restrains competition in some other manner. *American Tobacco Co.* v. *United States*, 221 U. S.

106, 177 (1911); *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 373-4 (1933); *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 597-8 (1936); *Window Glass Mfrs. Assn.* v. *United States*, 263 U. S. 403, 413 (1923); *Standard Oil Co.* v. *United States*, 283 U. S. 163, 175, 179 (1931); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

Let us test the charge of the trial court with these pronouncements of the law by this Court. It definitely appears from the cases cited above that cooperative effort to raise prices solely through the elimination of a competitive abuse may be legal. The trial court, however, instructed the jury that

> "• • • It is illegal and a violation of the Sherman Law for a group of individuals or corporations, or both, to act together to raise the prices to be charged for the commodity which they manufacture, where they control a substantial part of the interstate trade and commerce in that commodity" (R. 2404-5).

Obviously the two propositions are inconsistent.

The Government in its brief asserts that the charge of the district court is justified by and was based upon the decisions of this court in cases involving agreements to fix market selling prices. If it is intended to mean that the price-fixing cases sustained the charge actually given, then we submit the Government has misconceived those cases. An examination of the decisions clearly reveals that this Court has never condemned price-fixing combinations merely because they raised prices. On the contrary, they condemn such agreements because they achieve that

result by suppressing the play of competition in the determination of price. They are illegal *per se*, because they defeat the very purpose of the Sherman Law, *i. e.*, they substitute an arbitrary agreement for the play of competition in the determination of price. That this is true can be illustrated by examining the leading price fixing case, *Trenton Potteries Co.* v. *United States*, 273 U. S. 392 (1927).

In that case manufacturers controlling the manufacture and sale of sanitary pottery agreed to sell only at prices to be determined arbitrarily by the group. It is obvious that the agreement destroyed any price competition formerly existing between the parties. In spite of this fact the defendants urged upon the court that there had been no undue enhancement of prices and for that reason the restraint of trade was not condemned by the Sherman Law. But this Court rejected this argument and pointed out that the Sherman Law was not directly concerned with prices but with the preservation of competition as follows:

> "That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. • • • Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirabil-

ity of an unrestrained competitive system, it can not be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *Standard Oil Co.* v. *United States, supra; American Column Co.* v. *United States*, 257 U. S. 377, 400; *United States* v. *Linseed Oil Co.*, 262 U. S. 371, 388; *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 614.

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. * * *" (273 U. S. at 396-7).

In that case this Court expressly sustained an instruction which refused to make the issue of guilt or innocence depend upon whether the combination had produced reasonable or unreasonable prices, saying:

"The trial court charged, in submitting the case to the jury, that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints. * * * (*Ibid*, 395).

* * *

" * * *in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend

upon so uncertain a test as whether prices are reasonable * * * (*Ibid*, 398).

* * *

"The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict. * * *" (*Ibid*, 401).

The true ground of decision in the *Trenton Potteries* case, was that the defendants had the power and purpose to suppress the play of competition in the determination of market price and to substitute an agreed-on market price for a competitive one. The determining factor was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable.[5]

There is nothing, then, in the cases which justifies the charge of the court that the test of legality of this combination is merely whether there was purpose and power to raise prices. Under the cases considered here and on the evidence adduced, the court was under a duty to make it clear to the jury that they must consider: (1) Whether or not distress gasoline was or was not a competitive evil in this industry. (2) Whether the concerted action of the respondents was taken in an effort to remove such competitive abuse. (3) Whether that concerted action in purpose or effect went beyond the mere freeing of competition in the industry from the distorting effect of the abuse and

[5]The other cases involving agreements to fix market prices are to the same effect. See cases cited, B. 71-3.

imposed some other restraint unnecessary and undue in character.

The court should have made clear to the jury that if the method for removing the abuse did not impose a restraint beyond what was necessary to correct the abuse, and the spot market price continued to be a reflection of the play of competition, then the restraint would not be undue. He should have made it clear that the restraint would not become "undue" because of the removal of the artificially depressing effect on price of an abuse, necessarily thereby contributing to a rise in and stabilization of the market price at a higher level. Instead of doing so, the court instructed the jury that if the combination had the power and purpose to contribute to any extent to a rise in price, it was unlawful.

D. The district court committed reversible error by instructing the jury that it was to consider the reasonableness of the respondents' acts, and the facts and circumstances surrounding them, only if it first found (a) that respondents did not have the power to raise the level of spot market prices, or (b) that they did not combine for that purpose, and (c) that their purchases affected the spot market prices only indirectly and incidentally.

In the last section we have pointed out that the district court committed reversible error in instructing the jury that it should find the respondents guilty even if it found no more than that they had combined for the purpose or with the effect of raising prices, without regard to whether or not they had fixed or controlled prices or otherwise unreasonably restrained competition.

The error in the court's charge, however, goes even deeper than this. For, even if the court had correctly in-

structed the jury as to the tests of legality or illegality under the Sherman Law—i.e., as to the necessity of finding an unreasonable restraint of competition and the standards for determining it as applied to the evidence in this case—the jury would have been unable to apply those tests because it was not permitted to consider the facts and circumstances surrounding the respondents' activities. This error was fundamentally prejudicial, and by itself would require reversal of the judgments of guilty. The Government concedes that "there was a wealth of evidence from which opposing factual inferences might have been drawn" (B. 147). The instruction now complained of compelled the jury to draw its inferences without examining the very evidence which, under the decisions of this Court, must be particularly examined in order to determine what inferences are to be drawn.

That portion of the charge here complained of reads as follows:[1]

> "If you should find that the defendants acting together, and those independent refiners found acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, *or* that they did not combine for that purpose, *and* if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally, then you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to produce destructive competition and restore competition to a fairer base and produce fairer price levels. In such event, you may con-

[1] R. 2414.

clude that the purchase of such gasoline in the manner shown by the evidence was reasonable and beneficial and not injurious to the public interest and that, therefore, the restraint of trade was not undue and not illegal, and you may acquit the defendants." (Italics supplied.)

Analyzing the charge as made, it very definitely instructs the jury that it may not consider the facts and circumstances surrounding the respondents' activities to determine whether such activities were reasonable and beneficial and not injurious to the public interest, *unless* the jury shall first find in the absence of such facts and circumstances:

(1) that the respondents did not possess the power to raise the spot market prices, or

(2) did not combine for that purpose, and

(3) *in either of the above cases,* their purchases only indirectly and incidentally affected the spot market prices.

It requires only a word to make apparent the vice inherent in this charge.

(1) The effect of this, taken with what had gone before in the charge, was to tell the jury: If you find a combination with power and purpose to raise price, then that is the end of it; you must convict without determining whether the concerted action of the respondents was intended merely to remove destructive competition and to restore competition to a fairer basis; you are also precluded from considering whether the competitive forces, over which the respondents had no control, limited their power to raise prices beyond the level naturally resulting from the removal of the competitive abuse.

On the other hand, even if the jury found that there was no power to raise prices, they were still authorized to continue with their consideration of the case, and presumably to find the respondents guilty—because if not, why should they continue. Thus the jury was authorized to find an undue restraint after it had previously found an utter lack of power to restrain. It is legally impossible for the two findings to co-exist.

(2) The next portion of the charge precluded the jury from examining the surrounding facts and circumstances unless it first found that the respondents had not combined to raise prices. Of course, if there was no combination there should have been no conviction. Again the jury was required to find the respondents not guilty *before* considering the surrounding facts and circumstances to determine whether or not they were guilty.

(3) Not only did the charge require the jury, before it could apply the rule of reason, to find either that there had been no combination, or that the combination had no power, but it required the jury also to find that the combination's effect upon price must have been indirect and incidental. Obviously, no jury could determine whether the restraint was incidental or indirect without first looking at the surrounding facts and circumstances. The court's charge, however, forbade the jury to look at the surrounding facts and circumstances unless it first determined, *in the absence of such facts and circumstances, that the restraint imposed was incidental.* For, as shown above, it removed from the jury's consideration, *until* they had found that the restraint was incidental, the only facts (*i.e.*, the facts and circumstances surrounding the respondents' acts) upon which such a finding could be based.

The instruction of the court, which clearly permitted such a result, called for immediate modification and the giving of respondents' requested instructions Nos. 89 and 90.[2]

E. Respondents took specific exceptions to the instructions complained of.

The Government finally asserts that "respondents' failure to take any exceptions specifying the error now alleged bars them from raising it in their appeal." (B. 68).

The record discloses, on the contrary, that the exception taken to the portions of the charge here complained of was specifically directed to the precise error relied on. As we have seen, the trial court instructed the jury to return verdicts of guilty if the respondents had contributed in any degree to the rise of gasoline prices without regard to the effect of the combination upon competition. Furthermore, it specifically forbade the jury to consider the facts and circumstances surrounding the respondents' activities. Exception was taken to so much of the charge "as stated that any agreement between persons having for its purpose the raising of prices as distinguished from the fixing of prices was itself unreasonable under the Sherman Act, irrespective of other circumstances."[1] Exception was also specifically taken "to the Court's charge that a combination to raise a price where there is power to control such price is in itself unlawful and unreasonable, even though that power to affect prices as shown by the evidence, is merely power to remove an obstacle to a

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[2]R. 2382, 2386. See Assignments of Error Nos. 47 and 48, R. 2556, 2560.

[1]R. 2424.

healthy, competitive price, and to remove a destructive practice in the industry in and by the methods shown by the evidence.'"[2] The trial court was also expressly requested to give Instructions Nos. 89 and 90,[3] which it had previously refused to give. It adhered to its refusal. It also refused to further define for the jury "* * * what constitutes lawful and unlawful restraint, and to state to the jury what circumstances they should take into account in determining whether or not a given restraint is reasonable or unreasonable * * *."[4] It also refused to charge the jury that it must find, in addition to the possession of power by the respondents in company with the independent refiners to raise the price of gasoline, that the respondents exercised that power "by the means charged in the indictment, not by some other means."[5]

The record therefore discloses, not only specific exceptions to the instructions complained of, but specific requests for instructions which would have corrected the error and exceptions to the court's failure to give such instructions. It is well settled that such exceptions are sufficient to preserve the respondents' rights on appeal.

Connecticut Mutual Life Ins. Co. v. *Hillmon*, 188 U. S. 208, 213 (1902);

Long-Bell Lumber Co. v. *Stump*, 86 Fed. 574, 583 (1893);

Overman Wheel Co. v. *Griffin*, 67 Fed. 659, 662 (1895).

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[2]R. 2430. The fundamental nature of the trial court's error in this respect is raised by Assignments of Error Nos. 43, 46, 47, 48, 49 and 56, R. 2553, 2555, 2556, 2560, 2563, 2568.

[3]R. 2380, 2382, 2386.

[4]R. 2425. See Assignments of Error Nos. 47 and 48, R. 2556, 2560.

[5]R. 2427.

II.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN THE EXCLUSION OF EVIDENCE.[1]

The Circuit Court of Appeals held (R. 3941-2) that the district court had committed reversible error in excluding evidence of

(1) "The facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; * * * The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained * * *."

(2) Facts showing that the Federal Petroleum Administration encouraged and cooperated with the respondents in the activities for which they were convicted, as bearing upon "the purpose or end sought to be attained."

(3) Facts showing "the nature of the restraint and its effect," and specifically facts demonstrating that prices of gasoline in tank car spot markets and the Mid-Western area were not arbitrarily fixed and controlled.

It is the position of the respondents, and the Circuit Court of Appeals has held (R. 3941), that these offers of proof fall directly within the rule which Mr. Justice Brandeis laid down in the *Chicago Board of Trade* case

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[1]This point was raised in the Circuit Court of Appeals by Assignments of Error Nos. 22-36 (R. 2520-43). The Circuit Court of Appeals sustained the respondents' contentions on pages 39-41 of the record. The question is represented by the petition in No. 346 (p. 2).

as to the evidence which the court "must ordinarily consider" in a Sherman Act case:

> "• • • The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. *To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.* This is not because a good intention will save an otherwise objectionable regulation on the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences • • •" (246 U. S. at 238, italics supplied).

We shall consider the excluded evidence under the headings set forth above.

A. Offers to prove "the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed; * * * the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained * * *."

Among the items of evidence along this line which the district court excluded are the following:

1. The background and provisions of the N. R. A. Petroleum Code.[1]

2. The manner in which the price of crude oil was raised to $1.00 a barrel on September 29, 1933.[2]

3. The order of Secretary Ickes dated October 16, 1933[3] *in which the Federal Petroleum Administrator determined that the average cost of manufacturing 60-64.9 octane gasoline from $1.11 crude oil would be 6½¢ per gallon, and fixed the minimum price at that level.*

4. The National Petroleum Agency Agreement, approved by the Administrator on January 19, 1934[4] which provided:

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[1]The following offers of proof dealt with this subject: Franklin offer re price fluctuations and lack of parity between crude and tank-car prices, R. 976-8; Franklin offer re conditions in the oil industry prior to Petroleum Code, R. 960-1; Moffett offer re conversation with President Roosevelt, March 8, 1933, R. 1150-2; Franklin offer re governors' conference, March, 1933, R. 963-76. (For description of these matters, see Appendix A, pp. 30-32. The Code itself was offered as Def. Ex. 710 for Identification, R. 3141.

[2]Franklin offer re conversation with Ickes on $1.00 crude price, R. 957-9 (See Appendix A, pp. 35-36).

[3]Def. Exs. 829 and 830 for Identification, R. 3324, 3329.

[4]Def. Exs. 831, 832 for Identification, R. 3329, 3330.

"6. The purpose of this association is to purchase, hold and, in an orderly way, dispose of *surplus gasoline* which threatens the stability of the oil price structure in an effort to bring the prices of gasoline into proper relationship with the present price of crude oil and to maintain and support such relationship. *For the purposes of this agreement the proper relationship between mid-continent crude of 36°-36.9 A.P.I. gravity and U. S. motor gasoline of 60-64 octane rating, f.o.b. Group 3 in tank car lots, is that stated in section 6 of Article III of the aforesaid Code* * * * [*i. e., 1:18.5*]." (Italics supplied.)

5. The background of the Refinery Amendment to the N. R. A. Petroleum Code *showing that the express purpose of the Amendment was to force major companies to purchase gasoline from independent refiners.*[5]

6. The attempts of the Federal Petroleum Administration to remove obstacles to the return of the price of gasoline to parity with $1 crude oil,[6] *including four Government-*

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[5]Press release accompanying refinery amendment, Def. Ex. 848 for Identification, R. 3389; Shatford offer re purpose of refinery amendment, R. 1037-41 (see Appendix A, pp. 47-8).

[6]Moffett offer re conversation with C. E. Arnott, September, 1933, R. 1156-7; Franklin offer re conference with Petroleum Administrative Board on East Texas crude oil purchase plan, R. 992-5 (see Appendix A, pp. 68-9); Moffett offers re conference with President Roosevelt, September, 1933, and October, 1933, R. 1153-4, 1156-7 (see Appendix A, p. 43). Shatford offer re conference with Petroleum Administrative Board on proposal that refiners hold product for a minimum price, R. 1056-7; order approving Pacific Coast Agency agreement, Def. Ex. 1029 for Identification, R. 3817.

sponsored programs for the purchase by major companies of distress gasoline in the hands of independent refiners.[7]

7. Evidence as to the failure of the Administration's attempts to raise the price of gasoline to parity with the price of crude oil *showing the actual figures collected by a Government agency as to the costs of manufacturing refined products and the losses which were suffered by independent refiners during 1934 and the spring of 1935.*[8]

8. The background of Secretary Ickes' letter of July 20, 1934, to the respondent C. E. Arnott.[9]

Perhaps the fundamental element in the whole situation that led to the respondents' buying activities was the disparity between the price of gasoline at the refinery and the price of crude oil. The Government, in its brief (B. 34), makes light of this disparity and of the reasonableness of efforts to cure it by removing distress gasoline. It was of vital importance to the defendants to show three things as to this matter. *First,* the public importance which the Government attached to the maintenance of a price level for crude oil which would assure the preservation of that irreplaceable natural resource; *Second,* the fact that the disparity of the price of gasoline, not only threatened the

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[7]Shatford offer re 1934 buying programs, and orders relating thereto, R. 1045-52, Def. Exs. 844, 845, 846 and 847 for Identification, R. 3367, 3372, 3376, 3386, 3389 (see Appendix A, pp. 50-5).

[8]Franklin offer re conditions in East Texas field, 1933-1934, R. 1122-4; Travis offer re same, R. 1125-7; Swensrud offer re economic condition of independent refiners, R. 1428-32 (see Appendix A, pp. 58-61).

[9]Titus offer re conversation with Fahy and Arnott and Titus opinion, R. 1832-7, Def. Ex. 892 for Identification, R. 3489 (see Appendix A, pp. 69-73).

extinction of the small non-integrated refiners, but exerted an almost irresistible pressure toward breaking the conservation price level of crude oil; and, *Third*, the fact that one of the principal causes of this disparity was the existence of distress gasoline in the hands of independent refiners and that the Government recognized the existence of such gasoline as a threat to the price of crude oil. If the existence of this crude oil price level was important, if the disparity was threatening it, and if distress gasoline was one of the causes of the disparity, then the importance of measures to remove distress gasoline immediately becomes real and evident, and clearly has a bearing on the reasonableness of such efforts.

The items of evidence enumerated above establish these three propositions beyond the possibility of a doubt. They were specifically offered for that purpose. The trial court excluded them one and all on the bare ground that they dealt with events prior to the appointment of the Tank Car Stabilization Committee.[10]

The importance of this evidence can hardly be illustrated more forcibly than by referring to page 15 of the Government's brief where it opens its discussion of the Mid-Continent buying program as follows:

> "The conspiracy for which respondents were convicted had its inception in a meeting held in Chicago on January 4, 1935, called by respondent Arnott, a vice-president of Socony-Vacuum, and attended exclusively by representatives of major oil companies (R. 1167-9). The meeting was one of a series called to consider elimination of retail price wars, but at this meeting those present saw fit to

[10]See, for instance, the court's remarks in excluding the first of these offers of proof (R. 944).

embark upon a discussion of the desirability of raising spot market prices and the whole level of gasoline prices in the Mid-Western area."

There is not a word in the Government's brief of the efforts, stretching back for 15 months prior to January 1, 1935, to maintain a price of crude oil at $1.00. There is not a word about the attempts of the Government and the industry to bring the price of gasoline to parity with the price of crude oil. There is not a word about the part that distress gasoline played in defeating those efforts. The Circuit Court of Appeals found it necessary to discuss all of these facts at length in writing its opinion (R. 3917-8). The Government sought to prevent the jury from considering any of them. It sought to present the respondents' activities to the jury in the same light that it has presented them in its own brief—as a naked conspiracy with no motive and no explanation except avarice and greed.

The Government argues (B. 92-4) that this evidence was cumulative. A few illustrations will serve to answer this contention conclusively.

(1) Nine pages of the Government's brief are devoted to an attempt to ridicule of "respondents' attempt to show that the gasoline of independent refiners which the majors concertedly purchased and which they designated surplus or distress constituted a competitive evil." Reference to the respondents' statement of facts (pp. 29-31, 103-12, *supra*) and Appendix "A" (pp. 192-215) will clearly demonstrate that the evidence concerning distress gasoline is undisputed and that that evidence established that it consti-

tuted a serious competitive evil. The mere fact, however, that the Government on this record makes the contention outlined above suggests the vital need for further testimony as to the cause and nature of distress gasoline. Much of the evidence excluded by the court went directly to this point.[11] In the face of the Government's contention, how can it now possibly argue that it was cumulative to offer evidence that the Department of Interior itself had recognized distress gasoline as a competitive evil and that during 1934 it had launched program after program to eliminate that evil through purchases by major companies or otherwise.

(2) The illustration to which we have just pointed also reveals another fact. The action of the district court in excluding the respondents' evidence not only kept the jury in ignorance of the facts and circumstances surrounding the respondents' activities: *it misled the jury as to the import of the evidence which was admitted.* The Government's own brief shows how damaging this distortion of the facts must have been. On page 37 of its brief the Government says that there are grounds for doubting the accuracy and completeness of the report which the respondent Arnott made to the Petroleum Administrative Board on March 12, 1935. To prove this contention the Government says:

> "• • • Arnott testified that he told the Board 'in substance' what he had said at the allocators meeting on March 13, 1935 (R. 1730). As the stenographic report of this meeting shows, he then said

[11] *e. g.*, regarding the National Petroleum Agency Agreement, the purpose of the Refinery Amendment, and the 1934 buying programs, pp. 27-8, *supra*. Appendix A, pp. 43-55.

with reference to the buying programs that 'there are going to be no agreements' and 'no group buying' (Ex. 69, R. 2657)."

Taken by themselves, the words which the Government quotes were calculated to give the jury the impression that Arnott ha[d] deliberately misrepresented the scope and nature of the respondents' activities to the Petroleum Administrative Board. If the evidence of the 1934 buying programs had been admitted, however, it would have been clear what Arnott meant by "group buying" and "agreements". "Group buying" in 1934 had meant buying by *a central agency or pool* such as the National Petroleum Agency or the Pacific Coast Agency.[12] Under the 1934 programs, these had been *written agreements* following forms prescribed by the Petroleum Administrative Board and binding the purchasing companies to take large quantities of gasoline over long periods of time.[13] The District Allocators, whom Arnott was addressing were thoroughly familiar with these facts. When, therefore, he stated that the Mid-Continent buying program did not involve any "agreements" or "group buying", he was telling the exact literal truth in the sense that his hearers understood him. The jury, having been kept in ignorance of the 1934 buying programs, may well have fallen into the same error as the Government in its brief.

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[12]Def. Exs. 832 and 1029 for identification, R. 3330, 3817. When the Mid-Continent buying program was first proposed, it was specifically stated that "there were to be no pools or central buying agency" (McDowell, R. 1184).

[13]Def. Exs. 844, 845, 846 and 847 for Identification, R. 3367, 3372, 3376, 3386, 3389.

(3) Witness Franklin testified (as the Government states[14]) *to the conclusion* that the price of crude oil had been maintained at $1.00 "at the insistence * * * [of] the Petroleum Administrator."[15] He was not allowed to testify, however, that certain refiners had attempted to overcome this insistence and cut the price of crude oil; or that the threatened crude cut was a direct result of the Administrator's failure to raise the price of gasoline to parity with crude oil. He was not permitted to give the reason for the Administrator's insistence. The offer of proof on this subject[16] would have shown that the Administrator (Secretary Ickes) was informed that "if this cut in the price of crude oil takes place, the Oil Code is out of the window." It would have shown that Secretary Ickes told the Industry Code Authority: "Gentlemen, this price cut must not take place", and telegraphed the independent refiners who were threatening a cut "I personally urge you make no reduction at this crucial time and thus hinder effectuation constructive plans." It would have shown that the price of crude oil was maintained and a price cut prevented *only* upon Secretary Ickes' assurance that further attempts would be made to raise the price of gasoline and

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[14]B. 93. The Government also relies upon the fact that Arnott testified, in substance, that the independent refiners threatened to cut the price of crude oil in the fall of 1934 and that the Government took steps to discourage this (R. 1694-95). An examination of the record reference reveals that Arnott was describing a statement made at the General Stabilization Meeting of January 4, 1935. Even if the Government's contention as to the scope of this testimony were true, however, it would be but common fairness to permit independent corroboration of a defendant's testimony in his own behalf.

[15]R. 951.

[16]Franklin offer, R. 938-44.

that the independent refiners announced that if no improvement occurred within the next two or three weeks, they would make another attempt to reduce the price.

Reference to the other items of excluded evidence which the Government claims were cumulative will reveal similar situations.

B. Offers to prove that the Federal Petroleum Administration encouraged and cooperated with the respondents in the activities for which they were convicted, as bearing upon "the purpose or end sought to be attained."

We come now to certain offers of proof tending to show that the Government encouraged and cooperated with the respondents in their efforts to deal with the competitive evil of distress gasoline.

The theory upon which this evidence was offered is illustrated by the cases of *United States* v. *United States Steel Corp.*, 251 U. S. 417, 446-447 (1920), and *Fosburgh* v. *California and Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37 (C. C. A. 9th [1923]). We accept the abstracts of these cases contained in the Government's brief. They are as follows:

> "* * * In the *Steel* case, this Court, in rejecting a contention of the Government that the acquisition of a certain company by the defendant corporation was inspired by an intent to monopolize, referred (pp. 446-447) to testimony by President Roosevelt that he had approved the acquisition because it was economically necessary for the preservation and operation of the properties of the acquired company. Thus, in that case evidence of approval was material to show that the defendant's intention was other than as charged by the Government" (B. 96).
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> * * *

"The *Fosburgh* case was similar to the *Steel* case. It involved a suit in equity brought by the receiver of a candy company to cancel a contract for the sale of sugar to the company on the ground that a clause in the contract prohibiting resale by buyer violated the anti-trust laws. The question presented was whether the clause was included in the contract by the defendant sugar company pursuant to a Government war regulation under the Lever Act or whether it was included to restrain buyers from competing with the defendant company. The intention of the defendant was, therefore, material, and the court admitted evidence to show that the provision was inserted as a result of suggestions on the part of Government officials charged with enforcing that Act" (B. 97, n. 13).

One further fact should perhaps be noted. Neither President Roosevelt in the *Steel* case nor the Government officials in the *Fosburgh* case had any power by virtue of their offices to authorize the acts in question, or to confer any immunity from prosecution under the Sherman Law. The courts in both cases made specific findings to that effect.[1] Nevertheless, the courts in both cases admitted

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[1] In the *Steel* case this Court said:

"His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing that had even a tendency to its detriment" (251 U. S. 446).

In the *Fosburgh* case the court said that the United States Attorney had testified:

"* * * There was no legal provision that the sugar should be so distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the

and considered the evidence as bearing upon the parties' intent and purpose.

The Government does not dispute the doctrine of these cases. It argues only that the respondents in this case did not offer the evidence as bearing upon the issues of intent and purpose. Instead it argues (B. 97) that the evidence was offered as some kind of "legal defense" for the respondents' activities.

This is not the respondents' position. They never offered this evidence on the ground that it would establish a "legal defense" or confer immunity from prosecution under the anti-trust laws.

The trial court accepted the Government's view and excluded this evidence under the erroneous impression that it was offered in an attempt to secure immunity from prosecution in accordance with Section 6 of Article IV of the Code and Section 5 of the National Industrial Recovery Act.[2] There is no dispute that these sections require formal authorization in order that immunity be secured. No such formal authorization was obtained. But, the respondents repeatedly and in unmistakable language advised the court that they were not claiming immunity and that these offers were not made in an attempt to secure immunity but to show "the facts of the circumstances of the situations,

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business which they had transacted with them theretofore. * * * In making the statement that there was no legal requirement, I am just quoting the rules and regulations * * *" (291 Fed. 33, 34).

[2]Def. Ex. 835, R. 3347, 3350; 48 Stat. 195, 198.

which must be taken into consideration" in order to judge the purpose, effect and reasonableness of their activities.[3]

To illustrate: The first offer of proof which the respondents made along these lines was the offer to show that the Federal Petroleum Administration had approved the voluntary curtailment of major company refinery runs in March, 1935,[4] for the purpose of forcing the major companies to purchase gasoline from independent refiners. At that time counsel for the respondents explained the basis of this offer as follows:

> "Mr. Donovan: * * * let me say finally what I have said many times: We claim that what was

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[3]The only offers of proof made on the additional ground that they tended to show Governmental authorization were those dealing with the so-called "Pennsylvania situation" and Defendants' Exhibits 914 and 1030 for Identification (see offers and statements of counsel at R. 1364-5, 1679-81, 1887-9). Those offers did contain evidence that the Petroleum Administrative Board considered Mr. Arnott as having authority to stabilize refinery markets, and that the Board "encouraged" the respondents in their activities. (Frey offer, R. 1290; Def. Ex. 914 for Id., R. 3512, 3518; Def. Ex. 1030 for Id., R. 3869, 3873). Other evidence showed that the Board had "cooperated with" the respondents (Def. Ex. 917-A, R. 3522, 3525). Even in those cases, however, the respondents did not claim that the offered proof, if admitted, would have entitled them to any immunity from prosecution under Section 5 of the N. I. R. A. The evidence of "authority" and "approval" in these cases was offered for the reasons stated in the *Fosburgh* and *Steel* cases, *supra*. But this evidence, in addition to other grounds of admissibility, bore directly on the interpretation which in May, 1935 the Oil Administration put upon the proper scope of the Stabilization Committee under Secretary Ickes' letter of July 20, 1934, introduced by the prosecution (Govt. Ex. 891, R. 3487). It established conclusively that at that time the Federal Petroleum Administration construed the letter as extending to wholesale refinery prices instead of being confined, as the prosecution repeatedly asserted, to retail price wars.

[4]Shatford offers, R. 1016-7, 1017-8.

done by us did not come within the provisions of this section of the Code to which he refers, just as Mr. Francis has said. I have said repeatedly, your Honor, that we are not coming in here and claiming exemptions or immunity under that section. We say what we did was right and proper, and we will undertake to show the circumstances under which the Governmental bodies had knowledge of what we did and what they did in relation to that. That is perfectly simple" (R. 1019).

* * *

"Mr. Dorr: We are not saying that what the government says or does gives us immunity against the Sherman Law. We say what the government is trying to do is one of the facts of the business, one of the facts of the circumstances of the situation, which must be taken into consideration, which the court will take into consideration in determining whether or not the restraint was reasonable.

"Mr. Wood: I say, if you Honor please, that this evidence is admissible to show not only facts and circumstances upon which we rely as indicating that we didn't do what we are charged with having done, that this was some different kind of a program from that which the Government says it was; but also as bearing upon the administrative interpretation of the Code by those charged with this administration, including the Administrator himself, and his immediate advisers, the Petroleum Administrative Board, for what bearing that has upon our objectives and purposes, and upon the legality of what we did" (R. 1021-2).

The district court, however, said:

"Oh, well, if you are going to have anything as important as this, that regulates an industry so im-

portant as this—* * * you would certainly expect written approval.

"On the last offer of proof the objection of the Government is sustained. Exception allowed" (R. 1022).

Under this heading we propose to discuss the exclusion of:

(1) The evidence as to the voluntary curtailment of refinery runs in March, 1935.

(2) The official report of the Petroleum Code Survey Committee on Small Enterprises and the action taken by the Petroleum Administrative Board with respect to that report.

(3) The evidence as to the efforts of the Petroleum Administrative Board to have the respondent Arnott conduct in Pennsylvania a buying program similar in purpose and effect to the buying program he was conducting in the Mid-Continent.

(4) The Final Report prepared by the Marketing Division of the Petroleum Administrative Board pursuant to the President's Executive Order 7075 of June 15, 1935, and under the direction of Secretary Ickes.

(5) The testimony of Secretary Ickes, the Administrator of the N. R. A. Code of Fair Competition for the Petroleum Industry, and E. B. Swanson, a member of the Petroleum Administrative Board, before the Committee on Finance of the United States Senate in February, 1937.

1. *The voluntary curtailment of refinery runs in March, 1935.*

In March, 1935, the National Coordinator of Refinery Allocations under the Code requested the major companies to cooperate with the Administration by curtailing their manufacture of gasoline during March by some 1,400,000 barrels. The curtailment was requested with the knowledge and approval of the Federal Petroleum Administration. After receiving this request the major companies voluntarily curtailed their manufacture of gasoline by some 960,000 barrels of gasoline in March.[5]

After this background had been established, the trial court excluded evidence which would have shown that *before approving the plan* the Petroleum Administration had been advised that one of its purposes was to compel the major companies to buy a part of their requirements from independent refiners.[6]

2. *The official report of the Petroleum Code Survey Committee on Small Enterprises, and the action taken by the Petroleum Administrative Board with respect to that report.*

The admitted evidence showed that in January, 1935 Secretary Ickes appointed a "Petroleum Code Survey Committee on Small Enterprises," under the chairmanship of Paul Blazer, to study the plight or condition of the small units in the oil industry and see how they had fared under the Code, and to make recommendations as to what should be done to overcome the difficulties which

[5]Shatford, R. 1011, 1026-7, 1028-9, 1034-5; Def. Ex. 842, R. 3360.

[6]Shatford offers, R. 1016-8.

faced the industry.[7] The members of this committee became Government employees.[8]

The respondents offered the committee's report itself[9] in evidence. It would have shown that the committee reported to Secretary Ickes, in part, as follows:

> "Immediate relief is necessary if non-integrated refiners are not to be eliminated; it can come in only two forms.
>
> "1. An immediate and sustained increase in tank-car and retail gasoline prices to a parity with present crude prices, or
>
> "2. A reduction in the posted prices of crude oil to a parity with gasoline.
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> "• • • *We know of nothing, apart from continued improvement in crude production control, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with a broad stabilization program. We therefore urge that the Administrator give it his approval and active support.*
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> "Unfortunately, many people outside the Industry who recognize the desirability of conserving petroleum reserves and who strongly favor the preservation of small enterprises, are likely to be the first to criticize a moderate increase in retail prices of gasoline, not realizing that in so doing they are striking directly at the non-integrated units and throwing the entire Industry into the hands of a few large integrated companies.
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[7]Frey, redirect, R. 1320; Swensrud, R. 1377.

[8]Frey, redirect, R. 1320.

[9]Def. Ex. 924 for Identification, R. 3530, 3558-60.

"If, however, gasoline prices do not advance to an approximate parity with crude prices by an early date, within thirty days or thereabouts, or if they do not continue in such parity thereafter, then we recommend an immediate reduction in the price of crude oil to a parity with refined products. On the basis of prices as of this date a reduction of about 20¢ a barrel would be required to bring crude oil and gasoline prices into parity on the basis of the ratio of 18.5 to 1 as set forth in Section 6 of Article III of the Code * * *." (Italics supplied.)

The respondents also offered to prove that Charles Fahy, the Chairman of the Petroleum Administrative Board and the Deputy Administrator of the Petroleum Industry under the Code, in the course of making a formal report[10] to Secretary Ickes with respect to the committee's report and the action to be taken upon its recommendations, stated that:

"We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted; *e. g., we have encouraged stabilization efforts designed at this time to aid the independent refiner,* * * *." (Italics supplied.)

The respondents also offered to prove that on April 23, Fahy wired Blazer, the chairman of the Committee on Small Enterprises, as follows:[11]

"Would appreciate informal views your committee as to *whether gasoline prices have advanced to an approximate parity with crude prices* so as to obviate present necessity for reduction in crude

[10]Def. Ex. 1030 for Identification, R. 3869, 3873.
[11]Def. Ex. 921 for Identification, R. 3528.

oil price as recommended in refining conclusions and recommendations contained in report your Committee." (Italics supplied.)

And that Blazer wired the following reply:[12]

"Glad to advise informal opinion our Committee there is now no need for reduction crude oil prices since *we consider tank-car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank-car and retail prices.*" (Italics supplied.)[13]

3. *The evidence as to the efforts of the Petroleum Administrative Board to have the respondent Arnott conduct in Pennsylvania a buying program similar in purpose and effect to the buying program he was conducting in the Mid-Continent.*

At this point, it becomes necessary to consider the state of the record when the respondents offered the proof relative to the proposed buying program in Pennsylvania. At that time the respondents had established that:

(1) The respondent Arnott and I. A. O'Shaughnessy, a member of the Tank-Car Stablization Committee, had informed the Petroleum Administrative Board of the Committee's appointment on two occasions before the Committee had ever met.[14]

(2) On February 25, the day that he received the formal recommendations of the Tank-Car Stabilization Com-

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[12]Def. Ex. 922 for Identification, R. 3528.

[13]See also further correspondence between Fahy and Blazer, Def. Exs. 993, 994, R. 3746, 3748.

[14]Arnott, R. 1698, 1699-700; Def. Exs. 893 and 894, R. 3491, 3492.

mittee, Arnott had described the proposed Mid-Continent buying program to Dr. Frey.[15]

(3) Two weeks later, on March 12, 1935, Arnott had gone to see the Petroleum Administrative Board in Washington and had given them a complete report of what he was doing.[16]

(4) Although it was not suggested that the Petroleum Administrative Board should secure formal authorization for the program from Secretary Ickes, the Board "cooperated with" the program.[17]

The Government, however, still contended that the members of the Petroleum Administrative Board were apathetic if not hostile to the Mid-Continent buying program. In support of this position, Government counsel pointed to certain testimony (described above) which had been elicited on cross examination from Dr. John W. Frey, former member of the Petroleum Administrative Board, to the effect that at a conference on May 8, 1935, Fahy, the chairman of the Board, had told Arnott definitely "that the letter of July 20th gave him no authority, that he had no authority under the Code with reference to buying programs."[18] It contended that this statement constituted evidence that the Board *affirmatively disapproved* of the respondents' activities. From this the Government argued that not only did the Petroleum Administration not encourage the respondents' buying activities, but it had specifically warned Arnott to discontinue them.[19]

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[15]Arnott, R. 1729-30, cross, R. 1745-6.

[16]Frey, R. 1267, *et seq.*; Arnott, R. 1730.

[17]Def. Ex. 917, R. 3522, 3525.

[18]See p. 93, *supra.*

[19]See closing arguments of Government counsel, R. 2108-2345.

The respondents, however, offered to show that even if Fahy's statement on May 8, 1935 implied what the Government attributed to it, Fahy had quickly changed his mind and general attitude. Six days later, on May 14, 1935, he had asked Arnott to undertake in Pennsylvania a buying program of the same general character as that which he was conducting in the Mid-Continent.

The excluded evidence would have shown that:

(1) The small refiners in Pennsylvania, like those in the Mid-Continent, were suffering as a result of the disparity between the price of crude oil and the products made from crude oil. They had also built up excessive inventories which could be sold only at distress prices. Many of these refiners were being forced out of business.[20]

(2) The condition of the Pennsylvania refiners was well known to Fahy, Swanson and Frey of the Petroleum Administrative Board.[21]

(3) The Pennsylvania refiners had several times requested the Petroleum Administrative Board to take steps to alleviate their condition. In each case the Board had asked them to wait until the results of the buying program being conducted in the Mid-Continent became apparent.[22]

(4) On May 14, 1935, after a conference with J. M. Vockel and G. E. Willey of the Waverly Oil Works in Pennsylvania, Chairman Fahy of the Petroleum Administrative Board had sent the following telegram[23] to Arnott:

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[20]Frey offer, R. 1288, 1289.

[21]Frey offer, R. 1288, 1289; Brundred offer, R. 1354, 1355, 1356.

[22]Frey offer, R. 1287-8; Vockel offer, R. 1345-50; Def. Ex. 972 for Identification, R. 3694.

[23]Def. Ex. 916 for Identification, R. 3520; Frey offer, R. 1288-9; Vockel offer, R. 1351-2.

"Mr. C. E. Arnott,
c/o American Petroleum Institute,
Mayo Hotel,
Tulsa, Oklahoma.

"J. M. Vockel and G. E. Willey officials Waverly Oil Works on behalf own company and other small Pennsylvania refiners yesterday and today presented detailed picture refining situation their section. Present disparity between Pennsylvania grade crude and refined prices undoubtedly makes impossible continued operation several plants. Problem there related more to stabilized markets lubricants than gasoline. Hope you can arrange for prompt consideration this problem by Stabilization Committee looking both to immediate adjustments as well as long view correction. Would appreciate your assistance in this situation as it involves plants of long establishment which undoubtedly have not benefited equally with others under stabilization program because of their dependence on lubricants rather than gasoline. Please wire me as to possibility your undertaking this.

"Charles Fahy."

(5) In sending the telegram of May 14th the Petroleum Administrative Board wanted Arnott and the Stabilization Committee to go into Pennsylvania to improve the condition of the refinery market in that state by the same method that the Stabilization Committee had used under the buying program in the Mid-Continent area. Because of the excessive inventories of Pennsylvania lubricants, the Board believed that Arnott could make some arrangements whereby the major companies would purchase from the small independent refiners these excessive lubricants which were overhanging the market in Pennsylvania, and in that

way both relieve the plight of the independent refiner and cause the prices of finished refinery products to rise to their proper parity with the price of Pennsylvania grade crude oil.[24]

(6) On May 17, 1935 E. B. Swanson of the Petroleum Administrative Board wrote W. J. Brundred that the Board felt "that the Stabilization Committee • • • might be of definite assistance in connection with lubricants as they have been in connection with gasoline."[25]

4. *The Final Report prepared by the Marketing Division of the Petroleum Administrative Board pursuant to the President's Executive Order 7075 of June 15, 1935, and under the direction of Secretary Ickes.*

The offered portions of this report[26] describe the stabilization program conducted by the respondent Arnott in part as follows:

> "The chairman of the marketing subcommittee of the Planning and Coordination Committee effectuating the request of the Administrator organized a General Stabilization Committee and authorized the chairman of each regional marketing committee to instruct the various State code committee chairmen to appoint State stabilization committees wherever necessary • • •
>
> *"As the various problems were offered for discussion at the general stabilization committee meetings, subcommittees were appointed to make recommendations among these subcommittees. One of the most important was the tank-car committee, which*

[24]Frey offer, R. 1289-90.
[25]Def. Ex. 915 for Identification, R. 3519.
[26]Def. Ex. 914 for Identification, R. 3512, 3513, 3518.

attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank-car market was essential to a stabilized retail structure • • •." (Italics supplied.)

5. *The Testimony of Secretary Ickes, the Administrator of the NRA Code of Fair Competition for the Petroleum Industry, and E. B. Swanson, a Member of the Petroleum Administrative Board, before the Committee on Finance of the United States Senate in February, 1937.*

The respondents offered to show that on February 12, 1937, Secretary Ickes and Mr. E. B. Swanson testified befor the Senate Committee on Finance as follows:

"Senator Connally: Mr. Holland is in possession, is he, of the details in regard to those buying pools and things of that kind?

"Secretary Ickes: Mr. Holland or Mr. Swanson has all of that, because he was with the oil administration at that time.

• • • • • •

"Mr. Swanson: Mr. Chairman there were several so-called buying pool efforts, that began in December of 1933 and *continued from then on during the entire period of the Petroleum Code.*

"Senator Connally: *What was the purpose of the Department in participating or in authorizing or in aiding those buying pools?*

"Mr. Swanson: *It was an effort of the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss.*"[27]

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[27] R. 1841-2.

We believed that the vital materiality of all this testimony showing that the officials of the Federal Petroleum Administration had encouraged and cooperated with the respondents is apparent on its face. For the convenience of the Court we list the grounds of materiality and relevance *seriatim* as follows:

(1) All of this proffered evidence was relevant and material to show "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 221 U. S. 1, 70-7 (1911); *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360-1 (1933); *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 597-8 (1936).

(2) The evidence offered and rejected would have proved in terms that the officials of the Government charged with the administration of the Petroleum Code were cooperating with and encouraging the respondents in carrying on the alleged illegal buying program and that the fact of such cooperation was known to the respondents. Thus the evidence was relevant and material not only as showing the respondents' intent, purpose and motive, but also as being direct evidence that the aims and objectives which they sought to attain were lawful and in the public interest. See *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 576 (1936); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918); *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 93 (1912); *United States* v. *St. Louis Terminal*, 224 U. S. 383, 398 (1912).

(3) Evidence tending to show that those charged with the administration of the Petroleum Code encouraged and cooperated with these respondents in carrying out the buying program is entitled to great weight in determining whether the restraint, if any, was undue and unreasonable and therefore violative of law. *United States* v. *United States Steel Corporation*, 251 U. S. 417, 446-7 (1920), and *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37 (C. C. A. 9th, 1923).

(4) Throughout the trial, the Government took the position that the programs were carried on in secret, without the knowledge of the Petroleum Administration and in spite of their disapproval.[28] At a conference with Arnott on May 8, 1935, Charles Fahy, Deputy Petroleum Administrator, is said to have stated that the buying activities were not authorized by the Petroleum Code. From this the Government argued that Fahy had warned Arnott that the activities should cease.[29] It was therefore highly material to show that whatever Fahy may have thought or said on May 8, he was, within a period of six days, again encouraging Arnott to continue and in fact requesting him to expand his buying program activities.

• • •

The Government objects that this evidence of Government encouragement and cooperation was "indirect" and says that:

> "Where the defendants sought to establish so-called approval by the Government by direct evidence they were permitted to do so without limitation. They called only one member of the Petro-

[28] See p. 189, *supra*.
[29] *Ibid*, p. 93, *supra*.

leum Administrative Board, and the district court allowed them to examine him at length concerning conferences with Arnott and others at which major company purchasing was discussed" (R. 1263-92).

The objection of "indirectness" is somewhat mystifying. At no time during the trial did the Government object to this evidence on the ground that it was incompetent or secondary. Had it done so, and had the objection been sustained, it must be assumed that the respondents would have cured the defect. As it was, the only objection ever made to this evidence was that it was irrelevant and immaterial.

We can only conclude that this objection to the "indirectness" of the respondents' evidence is based upon the Government's belief that the evidence was offered to establish formal authorization and immunity from prosecution under the N. I. R. A. If this belief were well founded it might be argued that a formal written order would be the only competent evidence of approval. As we have already shown, however, the evidence was not offered for the purpose of establishing immunity and the Government has repeatedly been so advised.

Nor is it true that the respondents were permitted to introduce direct evidence "without limitation." Let this Court turn to the direct testimony of Dr. John W. Frey, the member of the Petroleum Administrative Board who testified for the respondents (R. 1263-1292). In thirty pages of testimony there is scarcely a question by the respondents' counsel which was allowed to pass without objection or an objection by the Government that was not sustained. The respondents sought to introduce by direct questions some of the very evidence which now constitutes the offers of proof, viz., the Final Report of

the Marketing Division of the Petroleum Administrative Board and the Board's request to Arnott to stabilize the refinery market in Pennsylvania. Objections to all such questions were sustained. Practically the only questions which this defense witness was permitted to answer on direct examination were those addressed to him by Government counsel and by the court.

C. Offers to prove "The nature of the restraint and its effect," and specifically facts showing that the prices of gasoline in the tank car spot markets and the Mid-Western area were not arbitrarily fixed and controlled.

The Government, at page 30 of this brief states:

> "One of the contested issues is whether the defendants' buying program, carried on with the active cooperation of the leading independent refiners caused the March-June advance in Mid-Continent spot market prices and the subsequent stationary price level thereafter maintained."

It argues that this fundamental issue was submitted to the jury and decided adversely to the respondents.

We have demonstrated at pages 132 to 148, *supra*, that the only issue submitted to the jury was whether the removal of distress gasoline in some manner and to some extent affected prices by raising them. But let us assume that the argument of the Government is sound. Any competent testimony showing the causes and the nature of the price rise and the subsequent stability then becomes vitally material and in fact indispensable to the jury in reaching a correct decision as to the issue which it is claimed was submitted to them.

The question presented is whether the price of gasoline was driven to levels which were not warranted by

the factors which normally affe price, or whether the respondents' activities merely removed certain artificial factors and permitted the price of gasoline to reach a fair competitive level. The trial court excluded proof of the following facts, offered by the respondents, which related directly to this fundamental issue.[1]

(1) The presence of hot oil and hot gasoline overhanging the market had kept the price of gasoline greatly below the cost of recovery for the entire period from 1932 until March 1, 1935, when the Connally Act went into effect, *except for one short period in October, November and December, 1934.*

(2) In October, 1934, a Federal Tender Board was set up in East Texas which for the first time effectively prevented the shipment in interstate commerce of hot oil. *Within a period of six weeks thereafter, the tank-car market rose one and one-half cents. Between March and June, 1935, the period of the alleged artificial price rise, the gasoline price likewise increased exactly one and one-half cents.*

(3) The various factors which primarily affect price—viz., crude oil inventories, crude oil production, gasoline inventories, gasoline consumption—were almost precisely the same in the fall of 1934 as they were in the spring of 1935.

It thus appears that this testimony as to the course of prices in the fall of 1934 would have amounted to testi-

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[1]The evidence in question will be found in Def. Ex. 849 for Identification, R. 3397; Shatford offer re price rise in October, 1935, R. 1061-2; Van Covern offer re factors affecting gasoline prices, October, December, 1934, R. 1491-1503 (see Appendix A, pp. 252-5).

mony concerning the behavior of prices *during the only period in the history of the industry when the conditions mentioned were the same as they were in the spring of 1935.*

It is apparent from this testimony that the similar increases in price which occurred in October, November and December, 1934, and March, April and May, 1935, were both caused primarily by the same factors, *viz.*, the condition of crude oil inventories, crude oil production, gasoline inventories, gasoline consumption and the elimination of cheap hot oil and hot gasoline.

The evidence was directed to a fundamental claim of the Government's. That claim was that, because there had been concerted buying of distress gasoline by the respondents in the spring of 1935, and because there had at that time been a rise in the price of gasoline, that price rise was an arbitrary rise, and the 1½ cents advance was evidence that the respondents, by their activities, had rigged and fixed the price at an artificial, non-competitive level.

Witness Van Covern, competent to explain to the jury the whole course of prices and the factors in the market, was asked when the price rise which culminated in June, 1935 began. He answered: "It started back in October, 1934."[2] He was then asked to analyze the factors which contributed to the price rise at that time. The objection of the Government was sustained.

It was the respondents' contention that only by a consecutive story describing this whole period could the history of the factors which were operative in the spring of 1935

[2]Van Covern, R. 1489.

be intelligently made clear to a jury.[3] The effect of the Court's ruling was to limit the proof to an arbitrary segment of time (the spring of 1935), and permit the jury to draw vital inferences against the respondents from what occurred in that particular segment of time without knowing what had preceded it.

The Government argues (B. 99-100) that there may have been factors in the fall of 1934 that did not exist in the spring of 1935 and that this would be confusing to the jury. The answer to this is that the witness would not have so testified. The offered proof discloses that it would have been his testimony that conditions in the two periods were essentially similar, and that the same factors which were primarily responsible for the price rise in the one period were primarily responsible for it in the other.[4]

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[3]It is to be noted that in his Annual Report in November (Def. Ex. 917 for Id., R. 3522-3) the Secretary of the Interior, when he was describing the advance for 1935, also began with the conditions back in the fall of 1934, and like the witness Van Covern, regarded the advance during the whole period as due to the introduction of new factors beginning in the fall of 1934, an advance interrupted by the Panama Refining Co. case decision in January, 1935, but resumed with the setting up of the second Federal Tender Board on March 1, 1935. That part of the Secretary of the Interior's report the Government also succeeded in excluding.

[4]The Government's attempts (B. 99) to meet this testimony are interesting. The first price rise was only 1⅛ to 1¼ cents; the price rise in 1935 was 1½ cents. In 1934 first one journal would go up and then the other; in 1935 the quotations in the two journals tended to rise together. In 1934 the low of the market and the high of the market were about ½ cent apart; in 1935 they were only ⅛ cent apart, etc. There is not the slightest hint and there could be none, that these facts indicate any real difference between the two periods in question.

The Government also claims that the import of the evidence would be a matter of controversy "because a buying program was in operation during *some of the time* in the last three months of that year" (italics supplied). This carefully-phrased statement fails to

Other offers of proof which the respondents offered for the same purposes, and which the trial court excluded on the grounds set forth above, were as follows:

(1) Evidence showing that the price of gasoline had borne a constant relationship to the prices of crude oil in every month of every year from January 1918 to October 1933. That relationship disappeared for the first time in October, 1933, when the price of hot crude oil fell below that of legal crude oil. It began to reappear in October, 1934, and again in March, 1935, when the cheap hot oil was eliminated.[5]

(2) Evidence showing (a) that gasoline prices were more depressed than the prices of other commodities and the cost of living in 1933 and 1934, (b) that gasoline prices recovered less than the prices of other commodities and the cost of living in 1935 and 1936, and (c) that gasoline prices rose less than the prices of other commodities and the cost of living in 1935 and 1936.[6]

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reveal the fact that the record contains no evidence of a buying program *during the period of the price rise* (October 18-November 8). On the contrary, it shows that the France Program, adopted in August, 1934, had failed, and that the Horween Buying Program, approved on November 2, 1934, was never put into execution. (See Appendix A, pp. 53-5.) In other words, the period in October and November, 1934 when the first price rise occurred was *practically the only period after April 1934 when there was no buying program of any sort in operation in this area.*

[5]Van Covern offer of proof re trend of gasoline and crude oil prices, R. 1518-20; Def. Ex. 955 for Identification, R. 3657.

[6]Van Covern offer re comparison of various commodity prices with gasoline prices, 1935-36, R. 1521-33, inclusive, Def. Exs. 956-959 for Identification, R. 3661-75, inclusive. (This offer was excluded upon the additional ground that it dealt with commodities other than gasoline. R. 1520-1.)

III.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN READING TO WITNESSES CALLED BY THE GOVERNMENT, AND PERMITTING GOVERNMENT COUNSEL TO READ AND REFER TO ALLEGED TRANSCRIPTS OF TESTIMONY BEFORE THE GRAND JURY IN THE PRESENCE OF THE JURY.[1]

The Circuit Court of Appeals held (R. 3945-8) that the trial court had committed reversible error in reading to witnesses called by the Government, and permitting Government counsel to read and refer to alleged transcripts of testimony before the grand jury in the presence of the jury.

The witnesses upon whom the Government principally relied to establish its case were employees of various of the respondents and former defendants. Government counsel endeavored persistently throughout the trial, by methods held to be grossly improper by the Court below, to persuade the jury that these witnesses were under pressure to avoid incriminating their employers. This persistent effort had a three-fold effect: (1) it magnified the significance of any testimony of these witnesses detrimental to the respondents; (2) it gave the jury the impression that the testimony before the grand jury could be accepted as affirmative evidence in this case; (3) it suggested the existence of additional facts not covered by any testimony and even more detrimental to the respondents; and (4) it prejudiced the respondents by persuading the jury that

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[1]This question was raised in the Circuit Court of Appeals by Assignment of Error No. 41, R. 2551. The Circuit Court sustained the respondents' contentions at pages 3945-8 of the Record. This question is presented in this Court by the petition in No. 346 (p. 2, n. 1).

they would suborn perjury to avoid discovery of their alleged unlawful acts.

Under the rulings of the trial court, Government counsel found their use of the alleged grand jury minutes an ideal means to this end. They were permitted without restraint to tell the jury again and again, by direct statement and by innuendo, that the witnesses were changing the stories, which they had previously told the grand jury, in an effort to avoid facts damaging to the respondents. Yet, at the end of the trial, the trial court found that the attack was wholly unjustified.

The trial court evidently felt that the constant assertion that Government counsel were merely refreshing recollection justified it in refusing to permit counsel for the respondents to examine the alleged transcript of the testimony before the grand jury to determine the accuracy of the Government's statement that the witnesses had changed their stories on the stand, and to rehabilitate the witnesses in the eyes of the jury by calling attention to related parts of their grand jury testimony. It seems obvious, however, that the claim of surprise, the request for the privilege of cross-examining on direct, and the repeated questions as to whether the witnesses had accurately testified before the grand jury, were entirely inappropriate if it was a mere question of refreshing recollection.[2]

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[2]This Court pointed out in *Putnam* v. *United States*, 162 U. S. 687, 697, 698 (1896), that the right to refresh recollection in no way depends upon surprise. It was said in the *Putnam* case that surprise is one of the elements necessary in order that the right to impeach may exist. It is clear, therefore, that Government counsel were actually attacking the integrity of the witnesses. The cases of *Hickory* v. *United States*, 151 U. S. 303 and *St. Clair* v. *United States*, 154 U. S. 134, which are cited by the Government (B. 102) in support of the practice engaged in, are no authority for the repeated and unjustified insinuations of Government counsel that the witnesses were lying.

Of this practice the Circuit Court of Appeals said:

> "That the procedure employed was erroneous, we think is borne out by the great weight of authority; and that it was unfair and prejudicial, we have no doubt. • • •
>
> • • •
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> "While the use of the testimony in such manner was erroneous, the damaging effect was its use in connection with statements made by counsel for the Government in which it was repeatedly insinuated, if not actually charged, that the witness was deliberately testifying falsely. It is difficult to believe that the jury could have received any other impression. The jury was told in the opening statement of counsel for the Government that certain witnesses for the Government, because of their connection with the defendants, would testify 'under the greatest stress and because he finds no other way out.' • • •" (R. 3946).

Apparently the Government does not seriously contend that this use of the alleged grand jury minutes was proper but confines itself to maintaining that, even though it may have been erroneous, it was not sufficiently prejudicial to constitute reversible error.[8]

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[8]See B. 103-104. For example, the Government contends (B. 103) that the fact that grand jury testimony was read or referred to some 90 times and embraced some 1000 lines of the record is of little significance in view of the magnitude of the record. It is submitted that the insinuation that a witness is lying need not be made many times in order to have a profound effect upon a jury. The contention that over 450 lines of the 1000 are found in the testimony of witnesses Steiger and Mosher, which related to the trade journals that were dismissed from the case, is dealt with subsequently herein (pages 223-8).

Respondents assert that the record clearly discloses prejudice in the general treatment of the grand jury minutes which has been outlined above and which so impressed the Circuit Court of Appeals. This prejudice arose as a result of four types of error which were highly damaging to the respondents and which made it impossible for the respondents to show the jury that the repeated statements and innuendo of Government counsel were without substantial foundation.

1. The court denied respondents the right to inspect the alleged transcripts of testimony before the grand jury to determine the accuracy of the alleged quotations and the statements of Government counsel with respect thereto.

2. The court permitted Government counsel to read from alleged grand jury testimony and from notes alleged to have been made from grand jury testimony which were not properly authenticated nor their accuracy sufficiently established.

3. The court repeatedly read and permitted Government counsel to read from the alleged transcripts of testimony before the grand jury under circumstances which undoubtedly led the jury to conclude that such alleged grand jury testimony was affirmative evidence in the case. In some instances it can be shown from the record that statements so read from the alleged transcript were not true.

4. The court repeatedly permitted Government counsel to read in the presence of the jury alleged grand jury testimony for the purported purpose of refreshing the witnesses' recollection, although it appeared from the record that such alleged testimony was not given contemporaneously with the occurrence to which it related.

A. The court denied respondents the right to inspect the alleged transcripts of testimony before the grand jury to determine the accuracy of the alleged quotations and the statements of Government counsel with respect thereto.

Counsel for the respondents again and again sought permission from the court to inspect the alleged grand jury transcript and notes of Government counsel, purportedly made therefrom, which Government counsel used as the basis for refreshing the recollection of the various witnesses.[1]

The court uniformly denied these requests.[2] Counsel for the respondents were thus unable to inspect this material at any time and could not ascertain its accuracy, learn whether other portions of the testimony explained the portions in question, or use it for redirect or cross-examination.

It is settled law in practically all jurisdictions that material which is used to refresh the recollection of a witness must be shown to opposing counsel upon demand.[3]

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[1]R. 374, 375, 446, 447, 448, 471-2, 547, 550-1, 630, 680-1, 1311, 1312, 1313-4.

[2]R. 374, 375, 446, 447, 449, 472, 547, 551, 630, 681, 1312, 1313.

[3]Although Government counsel maintained that they were using the grand jury minutes to refresh recollection, the record shows that in a great majority of the instances they used this material to impeach. (See pp. 211-3, *infra*.) But the rules relating to refreshment of recollection will be applied, in view of Government counsel's insistence that the testimony was used for that purpose and in view of the court's rulings on that ground. *Nardi* v. *United States*, 13 F. (2d) 710, 711-2 (C. C. A. 6th, 1926.). The denial of inspection was equally improper, however, even if its use were considered as impeachment. *Wright* v. *Bragg*, 96 Fed. 729, 733 (C. C. A. 7th, 1899), cert. den. 186 U. S. 486; *United States* v. *Cotter*, 60 F. (2d) 689, 692 (C. C. A. 2d, 1932), cert. den. 287 U. S. 666.

Morris v. *United States,* 149 Fed. 123, 126 (C. C. A. 5th, 1906);
Lennon v. *United States,* 20 F. (2d) 490, 494 (C. C. A. 8th, 1927);
Little v. *United States,* 93 F. (2d) 401, 406 (C. C. A. 8th, 1937), cert. den. 58 S. Ct. 643;
People v. *Schepps,* 217 Mich. 406, 408-9, 186 N. W. 508, 509 (1922);
State v. *Patton,* 255 Mo. 245, 254, 164 S. W. 223, 225 (1914).

See authorities cited in 2 *Wigmore on Evidence* (2d ed. 1923) §762.

In the instant case the trial court overruled respondents' requests for inspection principally upon the ground that the grand jury testimony was confidential.[4] Respondents submit that the rule that grand jury proceedings are secret is a limited one and that it does not authorize the denial of the right to inspect minutes of the grand jury testimony where they are used for refreshing or impeachment purposes.

Since the Government does not seriously dispute this, it is unnecessary to devote any considerable space to show-

[4]R. 446, 449, 472, 547, 630. The court also indicated that it had in mind the requirement that the witness use the paper to refresh his memory while on the witness stand, in order that the right to inspect may exist (R. 550). *Lennon* v. *United States,* 20 F. (2d) 490, 493-4, (C. C. A. 8th, 1927), was cited by the court in support of this proposition. This case merely held that a paper which had been used by the witness out of court, the day before, to refresh his memory could not be called for. There is no holding, or even intimation, that the right of inspection does not exist where the paper is read to the witness in court but is not handed to him. There appears to be no possible basis for such a distinction.

ing that there was no legitimate reason for the position taken by the trial court that the grand jury testimony was confidential. Suffice it to say that: (1) The universal rule is that there is no reason for keeping the grand jury minutes secret after the grand jury has been discharged and the trial has begun.[5] (2) All courts agree that the secrecy of grand jury proceedings will be waived whenever the ends of justice require it. When, therefore, grand jury minutes have been used in court by the prosecution for refreshment of recollection or impeachment, the veil of secrecy is gone and justice requires that the opposing party be entitled to inspect that portion of the grand jury minutes which is relevant.[6]

Under the circumstances just described it is clear that the denial of the right of inspection was, in effect, the denial

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[5] *Atwell* v. *United States*, 162 Fed. 97, 100 (C. C. A. 4th, 1908); *Metzler* v. *United States*, 64 F. (2d) 203, 206 (C. C. A. 9th, 1933); 5 *Wigmore on Evidence*, (2d ed.) §2362, p. 154. The considerations behind the requirement of secrecy for grand jury proceedings, *prior to the discharge of the Grand Jury*, have been often stated by federal and other authorities. Briefly, they may be summarized as follows: (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure complete freedom to the Grand Jury in its deliberations and to prevent importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the Grand Jury and later appear at the trial of the indicted parties; (4) to encourage free disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused, who is exonerated, from disclosure of the fact that he has been under investigation. *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. (2d) 254, 261 (D. Md. 1931); *United States* v. *Providence Tribune Co.*, 241 Fed. 524, 526 (D. R. I. 1917); 5 *Wigmore on Evidence* (2nd Ed.) §2360.

[6] *United States* v. *Cotter*, 60 F. (2d) 689, 692 (C. C. A. 2d, 1932), cert. den. 287 U. S. 666; *People* v. *Miller*, 257 N. Y. 54, 56-7, 177 N. E. 306, 307 (1931); *State* v. *Patton*, 255 Mo. 245, 254, 164 S. W. 223, 225 (1914).

of the right of cross-examination and of confrontation—in other words, of the constitutional right of every defendant to a fair trial. The Government apparently concedes that the denial of the right to inspect the grand jury minutes was error (B. 104-105). It argues, however, that (1) no prejudice resulted from such denial as existed in this case and (2) counsel for the respondents were accorded the equivalent of inspection to such exteht as they were entitled. Let us examine these contentions.

It is well settled that the denial of the right of inspection constitutes reversible error unless it affirmatively appears from the record that *no prejudice* resulted therefrom.

> *Morris* v. *United States*, 149 Fed. 123, 126 (C. C. A. 5th, 1906);
> *Wright* v. *Bragg*, 96 Fed. 729, 733 (C. C. A. 7th, 1899), cert. den. 186 U. S. 486;
> *Little* v. *United States*, 93 F. (2d) 401, 406-7 (C. C A. 8th, 1937) cert. den. 58 S. Ct. 643;
> *People* v. *Schepps*, 217 Mich. 406, 408-9, 186 N. W. 508, 509 (1922).

We look, therefore, to the record to see whether it can affirmatively be stated that the respondents were not prejudiced.

In his opening statement to the jury, the Special Assistant to the Attorney General, Mr. Crawford, predicted:

> "Now, gentlemen of the jury, I think from what I have already said, and certainly from what shall come afterwards from the witnesses, that you will appreciate the fact that much of this testimony giving you the facts with respect to this conspiracy

> is going to come from the mouths of men who are just as hostile to the Government in this prosecution as anybody can be, and you have a right to expect from what I have said thus far, and you will have better reason to expect, as we go along, that some of this set-up has got to come from the mouths of the very men who carried it on; and when Neil Buckley testifies to anything here relating to the facts in this case that may be detrimental to the major oil companies, you can believe that he is doing it under the greatest stress and because he finds no other way out.
>
> "The same will be true with respect to Jacobi.
>
> "You will also find that true, gentlemen of the jury, with respect to a great many other witnesses that the Government is going to call here" (R. 89).

The record demonstrates a consistent effort on the part of counsel for the Government to fulfill this prediction by an improper use of the alleged grand jury minutes.

Throughout the trial, in the presence of the jury, Government counsel repeatedly read or referred to the grand jury testimony of the witness who was on the stand as if it contradicted the testimony he was then giving at the trial.[7] Such reference to the grand jury testimony was under the guise of refreshing the recollection of the witness.

In many of the above instances, the grand jury testimony of the witness was entirely consistent with that given by him at the trial.[8] But in many other cases, the portion that was read or referred to appeared to be inconsistent, in whole or in part.[9]

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[7]See record references, pp. 211-3, *infra*.

[8]See, *e.g.*, R. 263-6, 372-80, 387-8.

[9]See, *e.g.*, R. 380-1, 393-4.

Government counsel would repeatedly bring forth the grand jury transcript, would insinuate that the witness was testifying falsely, and would then paraphrase it or read from it, or would request the court to do so. This was done time and again, regardless of whether the grand jury testimony was consistent with that given by the witness at the trial.[10]

Typical of the comments made by Government counsel are the following:

> "Mr. Crawford: We declare to the Court now that we are frankly surprised at the answer of this witness, and we have very good reasons for that surprise, which we will assert if permitted to do so" (R. p. 263, Witness Lanzer).
>
> "Mr. Lewin: Your Honor, the Government is distinctly surprised by this testimony, which is in direct contradiction to testimony given before the grand jury; and the Government asks permission to lead this witness, and to confront him with his grand jury testimony for the purpose of refreshing his recollection" (R. p. 373, Witness Jacobi).
>
> "Mr. Lewin: The Government is not satisfied with that answer, and is still completely surprised, and I would like to cross-examine the witness" (R. p. 407, Witness Jacobi).
>
> "Mr. Lewin: Q. And were those answers true when you gave them in response to those questions?" (R. p. 427, Witness Jacobi).

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[10]The Government asserts (B. 108) that defense counsel at the trial objected to only 4 of the 19 remarks to which respondents take exception at this point. This statement is wholly incorrect. Objections are to be found at R. 373, 394, 407, 426, 427, 449, 545, 590, 683, 672, 804, and, possibly, at 780. And, in order to eliminate interruptions the trial court stated that similar objections need not be repeatedly renewed (R. 391-392).

"Q. Well, is that correct testimony?" (R. p. 438, Witness Jacobi).

"Mr. Lewin: Q. How do you reconcile that with the testimony you say you remember you gave before the grand jury?" (R. p. 444, Witness Jacobi).

"Mr. Lewin: He does not now admit that he talked with him. I have read the minutes, and he denies that, and denies—his denial is in direct conflict with what I read from the minutes" (R. p. 449, Witness Jacobi).

"Mr. Chaffetz: If your Honor please, it does seem to me that that testimony is directly inconsistent with his entire—" (R. p. 545, Witness Evans).

"Mr. Chaffetz: I think the history speaks for itself, what the history was with respect to the two preceding witnesses who were on the stand. The jury and all present know without counsel trying to characterize it. Everybody knows that your Honor said the other day that these witnesses whom the Government is compelled to call, to obtain the facts are employees of the defendant companies. They are under pressure——" (R. p. 590, Witness Buckley).

"Mr. Crawford: Q. Uh-huh. And you said a little while ago that your purchases for the Gulf during '35 and '36 were about 15% of your total purchases of gasoline in those years? A. I estimated that, because I haven't checked those figures.

"Q. Yes. You also made an estimate on that when you testified before the grand jury here, didn't you? A. I don't recall whether I did or not.

"Q. And didn't you estimate that at 1/3, or 33-1/3%? A. I don't remember.

"Q. Your memory isn't good when it comes to that, is it?" (R. p. 672, Witness Bradshaw).

"Mr. Crawford: Enough has already been read by the Court, and enough questions have been asked

the witness to indicate that he should have his recollection refreshed, or something else" (R. p. 683, Witness Bradshaw).

Repeated comments of this sort were bound to inculcate in the minds of the jurors the feeling that the witnesses were testifying falsely or were concealing the truth. The brief statement in the charge of the court at the end of all the testimony could not suffice to remove this impression. Respondents were unable to gain access to the grand jury minutes to correct this feeling. They were therefore denied their constitutional right to cross-examine the witnesses who were confronting them. No further showing should be necessary to establish that this error was prejudicial.

But if further argument be necessary to convince the Court that respondents were prejudiced by their inability to examine the grand jury minutes, the following facts demonstrate prejudice beyond any possible doubt:

On one occasion the witness who was on the stand protested that his alleged answers before the grand jury might have a different significance if all the testimony that he gave before that body were produced.[11] On numerous occasions the witnesses did not recall having given the alleged testimony before the grand jury at all.[12] This reasonably raises the presumption that if the entire testimony were examined it would probably explain or modify the portion which, when read alone, the witness was unable to recollect. This presumption was clearly borne out during the course of the trial. At the outset the Government

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[11]See, *e.g.*, R. 651-3.

[12]See record references, p. 217, *infra*.

had read the grand jury minutes to the witnesses and had made statements that they were inconsistent with the oral testimony without submitting the minutes to either the court or counsel for the respondents. When the court later instituted the practice of reading the minutes themselves before permitting the Government counsel to use them, there were cases in which the court refused to permit them to use the portions which they had requested him to examine on the ground that, when other portions of the minutes were considered, the minutes were entirely consistent with the witnesses' oral testimony.[13] Upon at least one occasion the trial court, after examining the minutes, stated that a different light would be thrown on the grand jury testimony if the full text were used.[14] These statements, by the court and witnesses, demonstrate that other portions of the grand jury minutes which were not divulged by Government counsel would, in all probability, have served to clear up any apparent inconsistencies in the testimony which had been given. Respondents were, therefore, clearly prejudiced by their inability to gain access to these minutes, and to thereby remove any impression on the part of the jury that the witnesses were testifying falsely.

The Government's argument (B. 110) that respondents cannot complain of their inability to inspect since they did not ask to see the related portions of the grand jury minutes, which portions were not read aloud, is wholly without force. From an examination of the record it is apparent that counsel for the respondents asked to see whatever portions of the grand jury testimony might serve to explain or

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[13]See. *e.g.*, R. 544-5.

[14]R. 756.

qualify what was read by Government counsel. See *e.g.*, R. 374, 446, 448, 471-472. Counsel for the respondents did not ask to see all of the grand jury testimony but clearly indicated that their need was to see relevant portions which might serve to explain that testimony which had been read.

From what has been said, it is clear that the error of which respondents complain is reversible. They were denied their constitutional right to cross-examine properly the witnesses who confronted them.

As the Circuit Court of Appeals for the Eighth Circuit said in the case of *Little* v. *United States,* 93 F. (2d) 401 (C. C. A. 8th, 1937), involving the refusal of a trial court to permit defense counsel to examine certain notes which a Government witness had used to refresh his recollection:

> "Counsel for the government argue that it is impossible to say from the record whether the witness refreshed his memory upon a disputed fact or only on an undisputed fact, and that, therefore, the record fails to show that appellant was prejudiced. This argument is a misapplication of section 269 of the Judicial Code, as amended (28 U. S. C. § 391, 28 U. S. C. A. § 391), which provides that in an appellate proceeding judgment shall be given 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' In Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 48 S. Ct. 417, 419, 72 L. Ed. 761, the Supreme Court has declared:
>
> "'Since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, "is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the

rights of the complaining party." United States v. River Rouge Imp. Co., 269 U. S. 411, 421, 46 S. Ct. 144, 147, 148, 70 L. ed. 339.'

• • •

"Here appellant was denied his undoubted right properly to cross-examine the witness. The evidence as to his guilt was conflicting. He testified in his own behalf to facts which, if credited and believed by the jury, would establish his innocence. Under these circumstances, it would seem that the appellant had acquitted himself of the burden of pointing out in the record the denial of a substantial right. Rich v. United States, 271 F. 566, 570 (C. C. A. 8); Haywood et al. v. United States, 268 F. 795 (C. C. A. 7). See, also, Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; • • •" (93 F. [2d] at 406-7.)

B. The court permitted Government counsel to read from alleged grand jury testimony and from notes alleged to have been made from grand jury testimony which were not properly authenticated nor their accuracy sufficiently established.

In view of the manner in which the alleged grand jury minutes were used, and the remarks of Government counsel with respect thereto, it was obviously important that the accuracy of the documents from which Government counsel were reading, or to which they were referring, be established. Government counsel, however, failed entirely to authenticate the alleged grand jury testimony which they used at the trial. They made no effort to show that it had been reduced to writing in the presence of the witness, that it had been read over or examined by him at the time, or to show in some other acceptable fashion that its accuracy

was unquestionable. On the contrary, a perusal of the record indicates that there is serious doubt as to the accuracy of the grand jury testimony and notes of Government counsel, allegedly made therefrom, which were used as refreshing material.

The witnesses were not shown the transcript of the testimony or the notes of Government counsel in order that they might determine their authenticity and acknowledge that they had given such testimony before the grand jury. Upon numerous occasions the witness did not recall having given all or a part of the alleged testimony before the grand jury.[1] Upon other occasions the witness was dubious as to whether he had so testified, but he said that he might or must have done so, or that, if such testimony appeared in the transcript, he presumed that he had given it.[2] And several times the witness, at the time of the purported refreshing of his recollection, was not even asked if he had testified in the manner set forth in the alleged transcript.[3]

Not only was the alleged transcript of the grand jury proceedings used without being properly identified and verified, but Government counsel even went so far as to attempt to refresh recollection by means of counsel's own notes. These notes were not authenticated, verified, or shown in any way to be a true copy of the grand jury proceedings.[4]

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[1]R. 438, 453-4, 467-8, 517, 519, 533, 534, 627, 634, 637, 652, 655, 657, 658, 659, 672, 673, 678, 679, 737-8, 744, 761, 774, 790, 791, 794-5, 804.

[2]R. 443, 445, 655, 659.

[3]See, *e.g.*, R. 407, 756-7, 760, 771, 801-2.

[4]See, *e.g.*, R. 425-6, 446-7.

It is fundamental that any paper or document which is brought into the courtroom and used in connection with the examination of a witness must be properly authenticated and identified. Counsel may not simply announce the nature of the document without establishing its authenticity and accuracy. It is equally fundamental that this rule applies to documents which are used to refresh the recollection of a witness or to impeach him.[4]

Putnam v. *United States*, 162 U. S. 687, 694 (1896);
New York Life Ins. Co. v. *Neasham*, 250 Fed. 787, 789 (C. C. A. 9th, 1918);
State v. *Patton*, 255 Mo. 245, 257-8, 164 S. W. 223, 226 (1914) *supra*.

In the *Putnam* case this Court stated:

> "• • • It is also clear that where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way as to make it competent for the purpose for which it is proposed to use it. • • •" (162 U. S. at 694).

It is thus apparent that the trial court committed error when it permitted Government counsel over objection to use the purported grand jury testimony without

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[4]The Government's argument (B. 111-112) that the impeachment cases are not analogous because the impeaching material, unlike refreshing material, is evidence in the case is unsound. The universal rule is that impeaching material is not affirmative evidence. *Southern Ry. Co.* v. *Gray*, 241 U. S. 333, 337 (1916); 2 *Wigmore on Evidence* (2d ed. 1923), Sec. 1018.

proper identification thereof. The fact that the right to inspect was also denied emphasizes the prejudicial nature of this error. The use of the notes of Government counsel, without any check upon their accuracy, was an even more glaring example of prejudice to the respondents in this proceeding.

Government counsel who have so misused the grand jury minutes, and who have obtained a conviction thereby, cannot now be heard to say that such misuse was harmless. *Coulston* v. *United States*, 51 F. (2d) 178, 182-3 (C. C. A. 10th, 1931.)

C. The court repeatedly read and permitted Government counsel to read from the alleged transcripts of testimony before the grand jury under circumstances which undoubtedly led the jury to conclude that such alleged grand jury testimony was affirmative evidence in the case. In some instances it can be shown from the record that statements so read from the alleged transcript were not true.

At the trial, the court and Government counsel read or paraphrased in the presence of the jury large portions of the testimony which various important witnesses had previously given before the grand jury. It is the contention of the respondents that this record discloses that such use of the grand jury minutes undoubtedly led the jury to believe that the grand jury testimony was affirmative evidence in this case. For that reason they contend that the judgments of conviction should be reversed.

Before coming to a consideration of the specific ruling here dealt with, we desire briefly to review the rules of law by which this question must be measured.

1. *The Law.*

(1) Where a memorandum or a transcript of previous grand jury testimony is used as a basis for refreshing the present recollection of the witness it is the well settled rule that the recollection of the witness is the only competent evidence and that the memorandum itself may not be treated as evidence.

Roll v. *Dockery*, 219 Ala. 374, 377, 122 So. 630, 632-3 (1929);

Terry v. *American Fruit Growers, Inc.*, 3 Harr. (Del.) 497, 506-7, 139 Atl. 259, 263 (1925);

Davis v. *Michigan Central Railroad*, 294 Ill. 355, 361, 128 N. E. 539, 541 (1920);

Springer, et al. v. *Labow*, 108 N. J. L. 68, 71, 155 Atl. 476, 477 (1931);

2 *Wigmore on Evidence* (2d ed., 1923), §763.

(2) A memorandum or a transcript of previous grand jury testimony used as a basis for refreshing the present recollection of a witness may not be read, shown or handed to the jury by the offering party on direct examination, since this might lead the jury to believe that the material so read, shown or handed to it was evidence in the case.

Stewart, et al. v. *Morris, et al.*, 88 Fed. 461 (C. C. A. 7th, 1898), petition for rehearing overruled, 89 Fed. 290, 291 (1898);

State v. *Patton*, 255 Mo. 245, 257, 164 S. W. 223, 226-7 (1914);

Littig v. *Urbauer-Atwood Heating Co.*, 292 Mo. 226, 247, 237 S. W. 779, 785 (1928).

In *Stewart, et al.* v. *Morris, et al.*, the court said:

"• • • There is nothing in the opinion to the effect that the witness was not at liberty to refer to the memorandum for the purpose of refreshing his recollection, the point decided being simply that the memorandum should not have been read to the jury. That was error even by the rule contended for as laid down in Wood, Prac. Ev. § 134, 'that the memorandum itself only becomes evidence when the witness, after examining it, although able to swear that he knew it to be correct when he made it, is unable to state the particulars from recollection.' • • •" (89 Fed. at 291).

(3) It is equally clear that the offering party may not read a memorandum or a transcript of previous grand jury testimony *to a witness* in the presence of the jury for the purpose of refreshing the witness' recollection under such circumstances as would probably lead the jury to treat the material read as competent evidence.[1]

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[1]The Government contends (B. 102), as it did at the trial, that it was surprised at the testimony of a number of its own witnesses and that it therefore had the right to proceed as on cross examination. The principles announced above, however, are also applicable where it is sought to refresh the memory of a witness on cross examination. *Rosenthal* v. *United States*, 248 Fed. 684, 686 (C. C. A. 8th, 1918), *supra*; 2 *Wigmore on Evidence* (2d. ed., 1923) §§763, 764. A hostile witness may be refreshed with a prior contradictory statement, but there may be no extensive reading of the refreshing material in the presence of the jury, *Rosenthal* v. *United States*, 248 Fed. 684, 686 (C. C. A. 8th, 1918), *supra*.

The same rule applies to the impeachment of a witness. *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2d, 1937); *Ward* v. *United States*, 96 F. (2d) 189, 191-2 (C. C. A. 5th, 1938); *Kuhn, et al.* v. *United States*, 24 F. (2d) 910, 913 (C. C. A. 9th, 1928), reversal as to one defendant on other grounds, 26 F. (2d) 463, cert. den. 278 U. S. 605; *Philadelphia & Reading Ry. Co.* v. *Bartsch*, 9 F. (2d) 858, 861 (C. C. A. 3rd, 1925). For it is well settled that impeaching material may not be considered as affirmative proof. *Southern Ry. Co.* v. *Gray*, 241 U. S. 333, 337 (1916).

Nardi v. *United States*, 13 F. (2d) 710, 711 (C. C. A. 6th, 1926);
Rosenthal v. *United States*, 248 Fed. 684, 686 (C. C. A. 8th, 1918);
Stearman v. *B. & O. Railroad Co.*, 6 App. D. C. 46, 52 (1895);
State v. *Patton*, 255 Mo. 245, 257, 164 S. W. 223, 227 (1914).

(4) Where the refreshing material is wrongfully placed before the jury, the error is reversible unless it can be said with certainty to have been harmless.

United States v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2d, 1937);
Nardi v. *United States*, 13 F. (2d) 710, 711 (C. C. A. 6th, 1926);
Chase v. *United States*, 13 F. (2d) 847, 848 (C. C. A. 6th, 1926);
Stewart v. *Morris*, 88 Fed. 461, 462 (C. C. A. 7th, 1898), *supra*.

2. *The Facts Complained of.*

The grand jury minutes themselves were read or referred to on approximately ninety occasions. Over one thousand lines of the transcript of the record consist of verbatim quotations from those minutes.[2] Upon many other occasions the grand jury testimony was paraphrased

[2]R. 265, 374-375, 378-380, 388, 394, 421-422, 423-426, 437, 438, 442-443, 448, 450, 453-454, 455, 466-467, 508-509, 517-518, 520, 521, 528, 531-534, 536, 547-548, 629, 647-648, 652, 655, 657-658, 659, 660, 681, 683-684, 740, 754-757, 758-759, 760, 762, 765-768, 771, 773, 775, 783-784, 796, 801-802, 803, 1297-1298.

by the court or Government counsel, or otherwise specifically referred to.[3] Government counsel and the court repeatedly stated that the use of the grand jury minutes was for the sole purpose of refreshing the recollection of the witnesses and emphatically denied that there was any attempt to impeach.[4]

An example of the way in which the grand jury testimony was read before the jury is to be found in connection with the examination by Government counsel of their witness Steiger. His testimony deals with the most vital issue in the case—whether the defendant companies paid higher prices for the gasoline which they purchased than jobbers buying on the open spot tank-car market a fact which would bear directly on the question whether the purchases of respondents led the market up or merely followed—and reads as follows:

> Q. Were there times during the period, March 1, 1935, throughout the rest of that year, in which they were higher than—Jacobi's prices given you were higher than the prices you were getting from independent refiners? A. I don't recall that they were.
>
> Q. If we read the testimony to you on that subject before the grand jury, would it refresh your recollection?
>
> Mr. Donovan: Same objection as appears at R. pp. 373-74, 446, 630, 680-81, 682, 727.

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[3]R. 359, 370, 381, 440-441, 463, 573, 575, 597, 606, 627, 628, 633-634, 637, 672, 737-738, 743, 744-745, 779-780, 792, 1310-1312.

[4]R. 263, 359, 373, 405, 423, 442, 446-447, 453, 455, 467, 508-509, 519, 521, 528, 531-532, 548, 575-576, 591, 648, 658, 739, 743, 756-757, 759, 764, 776, 794, 795-796, 802, 803, 1296, 1311, 1313, 2422.

The Court: Objection overruled; exception allowed.

A. I will do my best.

(Document purporting to be transcript of testimony before grand jury passed to the Court by Mr. Lewin.)

(The court reads silently.)

The Court: Q. Were you before the grand jury on Wednesday, June 3, 1936—I will read the questions you were asked and the answers you made, and then you may, if it refreshes your memory, you may answer the question asked you by Government counsel.

(Reading:)

"Mr. Lewin: Now, don't you know that the major buying under the programs was buying at or a little better than the price quotations made in the price-quoting service, the journals?

"Answer: There were times when their buying prices were higher, but there was also times when it was identical.

"Question: When it was identical?

"Answer; When those prices were identical.

"Question: Now, I suggest to you that the times in which they were generally higher were between March, 1935, and the first week in June, 1935. Is that right?

"Answer: Yes.

"Question: That is right, and the times in which they were right at the quotation was from the first week of June, 1935, to the first week in January, 1936?

"Answer: Yes.

"Question: That is right?

"Answer: As far as I can recall.

"Question: At another time, when they were a little bit higher than the quotations, was the first week in January, 1936?

"Answer: Was that when there was that little—

"Question: Rise.

"Answer: That little rise. Yes, I am sure that was true.

"Question: And the time when they were just at the quotation was in the first week of March, 1936, when there was a little dip in the curve; is that right?

"Answer: As I remember there was major company buying at those prices.

"Question: I am now addressing your mind to March, 1936.

"Answer: As I remember——

"Question: Do you recall the graph?"

The Court: Q. Was there a graph there? A. Yes, sir.

The Court (reading):

"Answer: Yes, I recall it.

"Question: Do you remember a little dip?

"Answer: Yes.

"Question: That little dip indicates major buying at the quotation of a little bit less, doesn't it?

"Answer: That is my impression, yes.

"Question: And that little dip was restored immediately, wasn't it?

"Answer: Yes, there was only—I don't know—

"Question: A week?

"Answer: Well, that is about right; about a week.

"Question: A week of slackening off on the major buying at the price, wasn't it?

"Answer: Yes.

"Question: And then the little restoration?

"Answer: Yes, it immediately went up.

"Question: Now, when it went up, that indicates the majors buying a little bit heavier than the quotation, doesn't it?

"Answer: Yes.

"Question: And to date your quotations and the price curve to illustrate them, show that the majors since the first week in March, 1936, to date, have been buying at the quotation exactly?

"Answer: That is my impression, yes.

"Question: Then a graph of your quotations is a representation of prices paid by majors under these concerted pools, isn't it?

"Answer: Yes.

"Question: And nothing more than that?

"Answer: It follows that graph, yes.

"Question: Exactly?

"Answer: Yes.

"Question: And the major company buying is so important, and has been given so much importance by you, that it is almost the sole reason for the shape of that graph?

"Answer: It is an important factor, yes.

"Question: Well, the one is identical with the other?

"Answer: Yes.

"Question: All you have done then since March of 1935 is report to the trade, without stating so, the major company program prices; is that right?

"Answer: Insofar as it is reflected in quotations and sales reported to us by refiners, yes.

"Question: And 'insofar' means altogether, doesn't it, because that is just where you got it?

"Answer: We got it from the independent refiners in their reports to us, and quotations.

"Question: And the data that brought about that

series of quotations in your paper, the effective data, were the sales to majors under the concerted pools?

"Answer: Those sales were included, were probably included in the refiners—jobbers' sales, to us.

"Question: And the sales to jobbers, pure jobbers at lower prices, were usually outweighed by the concerted buying pool prices that they never did pull that quotation of yours down throughout that period?

"Answer: They outweighed the jobbers' sales that were reported to us, yes.

"Question: The major company buying?

"Answer: Yes.

"Question: And since they outweighed them, they alone were given effect by you?

"Answer: Well, now, let's not make that quite so strong.

"Question: All right.

"Answer: The independent refiners reported to us their district sales.

"Question: That is right.

"Answer: Now, we indicated that many, probably most of those district sales that they reported to us as jobber sales were major company purchases.

"Question: You could have done this, and arrived at the same result: You could have gone to the major companies and learned from them exactly what they would pay under these programs, or what they thought it was necessary to pay, to keep the prices where they wanted them and reported it, and you would have got exactly the same result that you did get, from March, 1935, to date; is that right?

"Answer: That is right, but it is not true.

"Question: You did not go to them and ask them for that?

"Answer: We went to the refiners, yes, and asked for jobbers' sales.

"Question: That is the practice you followed?

"Answer: Yes.

"Question: But you knew when you did that, that in substance, in actuality, in truth, and in fact, what you really were reporting to the trade were major company concerted buying program prices?

"Answer: In substance, yes.

"Question: And that followed throughout the entire Mid-Continent field that you were reporting?

"Answer: Yes.

"Question: The Oklahoma market, the three Texas markets, the Kansas market, and the Louisiana-Arkansas market?

"Answer: If you look at it that way, yes."

Mr. Lewin: That is as far as I——

The Witness: May I explain myself on that?

The Court: Well, the question—does the reading of this refresh your memory?

Mr. Lewin: Q. Just let me ask you: Did you give the testimony that his Honor read, before the grand jury?

A. I imagine I did, but I was certainly mixed up when I did.

Mr. Lawton: What is the question now?

Mr. Chaffetz: There is a question pending.

The Court: What is that question?

(Question read as follows:

"Q. Were there times during the period, March 1, 1935, throughout the rest of that year, in which they were higher than—Jacobi's prices given you were higher than the prices you were getting from independent refiners?")

• • •

The Court: Q. Does this reading of the testimony before the grand jury refresh your recollection, so that you can answer it now?

A. It doesn't because I have gone back and checked the prices that we indicated in our market leads, with what we quoted, and I don't believe there was a time when those prices were higher.

Q. When what prices were higher?

A. When the major company buying prices were higher than our, than the Oilgram prices, and I would like to have a chance to explain that——

Q. You may. Go ahead.

A. Well, in the first place, that grand jury testimony is all wrong. It just—it is built on a pyramid of hypothetical questions or answers, and it was a build-up and, really, I must not have known what I was saying when I said some of those things there, because I know they weren't true.[5]

This record conclusively demonstrates that Steiger was right when he declared of these alleged grand jury statements "• • • I know they weren't true."

(1) The grand jury testimony gave it as Steiger's impression that the major companies were buying "at the quotation exactly" and that a graph of the gasoline price quotations of the Chicago Journal of Commerce "• • • is a representation of prices paid by majors under these concerted pools." *The Government's own audit of the purchases made by the major companies showed that 89.3% of them were made at or below the lowest quotations of the Journal of Commerce.*[6]

(2) Before the grand jury, Steiger had testified that "the times in which they [the prices paid by major com-

[5]R. 764-9.

[6]Govt. Exs. 750 and 751, R. 595-7.

panies] were generally higher [than the quotations] were between March, 1935, and the first week in June, 1935." The respondents' audit showed that during this period over 91% of the purchases made by the major companies were made at or below the lowest quotations in the Chicago Journal of Commerce.[7]

(3) Before the grand jury, Steiger allegedly said that the quantities purchased by the major companies "outweighed the jobbers' sales that were reported to us." In fact, all of the major companies named in the indictment, together bought only 11½% of the gasoline sold by independent refiners.[8] According to the Government's own contention, however, the jobbers purchasing on the open spot tank-car market bought from 21.8% to 39.5%.[9]

The excerpts from the grand jury minutes were therefore not true.

All three of the issues dealt with in these extracts from the grand jury minutes are still issues in this case. The Government contends (B. 17) that the respondents had a "commitment to purchase at not less than the going market price." It contends (B. 31) that respondents' purchases produced a "substantial contraction in supply," and (B. 47, note 56) that as a result of the respondents' activities, "brokers and other buyers in the East Texas spot market found it practically impossible to obtain supplies." It contends also (B. 20) that during the price rise in the Spring of 1935, there was a remarkable correlation between the prices paid by the respondent companies and the prices reported by the market journals. The alleged grand jury testimony of Steiger (which as we have seen

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[7]Resp. Ex. 1025, R. 662-3.
[8]J. D. Miller, R. 1646, 1649.
[9]See B. 47, n. 60.

was not true) was calculated to support each of these contentions which the Government was then making before the jury and which it is now making in this court.

The example set forth above is but a single typical instance of repeated reading and reference to the grand jury minutes. That procedure was repeated by the court or counsel for the Government time after time. Can it be doubted that the reading of pages of grand jury testimony in the presence and hearing of the jury tended to confuse in the jury's mind the testimony of the witness with the statements made before the grand jury? In fact, the grand jury testimony became, for all practical purposes, testimony in this case. And such testimony was peculiarly prejudicial because it was not true and also bore upon a vital issue in the case.[10]

The use of the grand jury minutes impressed the trial court. On a few occasions he warned the jury that it must ignore the grand jury minutes. But in his final charge to the jury the prejudicial effect of reading the minutes was intensified beyond the possibility of correction. The court charged:

> "Testimony given by some of the witnesses in this case when they appeared before the grand jury, was read to them when they appeared as witnesses in this trial. That was done for the purpose of

[10]It is difficult to comprehend the argument of the Government (B. 104) to the effect that 84% of the attempts to refresh failed and that affirmative testimony was given in only 14 instances. Apparently the Government argues that no affirmative testimony was given where the material which was read failed to refresh the memory of the witness. This is, of course, unsound, for, as in the case of Steiger, quoted above (pages 223-9, *supra*), the attempt to refresh failed and yet many pages of damaging and untrue material were placed before the jury.

refreshing their memory, and for no other purpose. You will understand that it was not used for the purpose of impeaching the testimony of the witness. The testimony of no witness who has testified here was inconsistent with any of the testimony he gave before the grand jury which was read to him in this case.'"[11]

The authorities conclusively establish that no error of this nature could be corrected by a subsequent charge to the jury. *United States* v. *Block*, 88 F. (2d) 618, 620 (C. C. A. 2d, 1937). But the charge did not even tend to correct the error. On the contrary, it magnified it. Take the case of Steiger. He repudiated his grand jury testimony on the stand and stated that such testimony if given was not true. *In fact the testimony was not true.* The jurors heard the grand jury testimony attributed to Steiger. They heard Steiger testify. They also heard the court instruct them that Steiger's testimony was not inconsistent with the testimony read to them from the grand jury minutes. Obviously, such a charge enabled and encouraged the jurors to assume *that the untrue grand jury testimony was the same as the true testimony of the witness on the stand. Not only that but the jury was encouraged to consider the untrue grand jury testimony as evidence in the case, corroborating the testimony given by the witnesses on the stand.* This was clearly prejudicial to the defendants.

The error resulting from the use of the grand jury minutes was intensified in another respect. Government counsel were repeatedly permitted to direct questions toward the grand jury testimony of important witnesses.

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[11]R. 2422.

This necessarily gave the jury the impression that the substance of the testimony before the grand jury was an important item for their consideration. Typical of such questions are the following:

> "Is that testimony right?" (R. p. 388).
>
> "* * * was this testimony correct when you gave it?" (R. p. 394).
>
> "Well, what do you say about that testimony that you gave before the grand jury, * * *? (R. p. 426).
>
> "And were those answers true when you gave them * * *?" (R. p. 427).
>
> "Well, is that correct testimony?" (R. p. 438).
>
> "Was it correct testimony?" (R. p. 443).
>
> "How do you reconcile that with the testimony you say you remember you gave before the grand jury?" (R. p. 444).
>
> "Would you say that is correct now?" (R. p. 445).

These questions were not asked for the purpose of impeachment. But, for whatever purpose, they had the necessary effect of emphasizing in the minds of the jury the testimony given before the grand jury which the court later instructed them was consistent with the testimony of the witnesses. And that testimony was wholly incompetent and highly prejudicial.

In the light of the decided cases, we respectfully submit that the prejudice resulting from the treatment of the grand jury testimony as affirmative evidence is demonstrated.

Rosenthal v. *United States*, 248 Fed. 684 (C. C. A. 8th, 1918);[12]

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[12]The *Rosenthal* case was an appeal from a conviction for false swearing in a bankruptcy proceeding. In reversing the judgment

United States v. *Block, et al.*, 88 F. (2d) 618 (C. C. A. 2d, 1937);

Philadelphia & Reading Ry. Co. v. *Bartsch*, 9 F. (2d) 858, 861 (C. C. A. 3rd, 1925);

Ward v. *United States*, 96 F. (2d) 189, 191-2, (C. C. A. 5th, 1938);

Nardi v. *United States*, 13 F. (2d) 710, 711 (C. C. A. 6th, 1926);

Stewart v. *Morris*, 89 Fed. 290 (C. C. A. 7th, 1898);

Stearman v. *Baltimore & Ohio R. Co.*, 6 App. D. C. 46, 52 (1895).

If further proof is required, we need only refer to the action of the jury in bringing in verdicts of guilty as to

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of conviction, the Circuit Court of Appeals for the Eighth Circuit stated:

"Another error committed was the admission of the testimony of Lipschitz, the main witness for the government, without whose testimony there was practically no evidence to justify a verdict of guilty. While, in view of his testimony, as given before the referee, it was proper to permit him to be examined as a hostile witness, and as one whose testimony at the trial was a surprise to the government, it was improper to read to him all of his testimony before the referee by way of cross examination, and ask him, as every question and answer was read before the jury, 'Did you not on the former occasion testify as follows?' This was not for the purpose of refreshing his memory, but was in fact introducing his testimony, in an examination before the referee under section 21 of the Bankruptcy Act (Comp. St. 1916, §9605). This was error. *Commonwealth* v. *Jeffs*, 132 Mass. 5; Chamberlayne on the Modern Law of Ev. §3507.

"For the errors indicated, the judgment of the court below is reversed with directions to grant a new trial" (248 Fed. at 686).

all defendants not previously discharged by court. The verdict of the jury could not have rested upon competent evidence, for after the verdict the court ordered the dismissal of the indictment against eleven defendants because there was no substantial competent evidence to support their convictions. The court ordered new trials as to eighteen others.

D. The court repeatedly permitted Government counsel to read in the presence of the jury alleged grand jury testimony for the purported purpose of refreshing the witnesses' recollection although it appeared from the record that such alleged testimony was not given contemporaneously with the occurrence to which it related.

Upon at least ninety occasions counsel for the Government attempted to refresh the recollection of witnesses Lanzer, Jacobi, Evans, Buckley, Cline, Bradshaw, Steiger, and others by reference to their prior grand jury testimony. It affirmatively appears from the record that, in many cases, the testimony of such witnesses before the grand jury was not given contemporaneously with the events to which it related. This fact is reflected in the following table showing in successive columns as to certain witnesses: (1) the record page where use of the testimony before the grand jury appears; (2) the name of the witness; (3) the date of the occurrences to which the testimony before the grand jury relates and (4) the date when the witness appeared before the grand jury:

Record Pages	*Witness*	*Approximate Date of Occurrence*	*Approximate Date of Testimony*
359-360	Jacobi	Jan. and Feb. 1935	Dec. 1936
370	Jacobi	March 5, 1935	May, July, Dec. 1936
373-380	Jacobi	March 1935	May, July, Dec. 1936
381	Jacobi	March 5, 1935	May, July, Dec. 1936
393-394	Jacobi	March 1935	May, July, Dec. 1936
421-422	Jacobi	March-June 1935	May, July, Dec. 1936
423-424	Jacobi	March-June 1935	May, July, Dec. 1936
424-427	Jacobi	March-June 1935	May, July, Dec. 1936
438-439	Jacobi	March 1935	May, July, Dec. 1936
442-444	Jacobi	March-April 1935	May, July, Dec. 1936
445-451	Jacobi	March-Feb. 1936	May, July, Dec. 1936
453-454, 455-456	Jacobi	March 1935-Feb. 1936	May, July, Dec. 1936
466-468	Jacobi	Jan. 1936	May, July, Dec. 1936
508-509	Evans	Dec. 1935-April 1936	July 1936
518-519, 520-521	Evans	March 1935	July 1936
521-522	Evans	March 1935	July 1936
528	Evans	March-June 1935	July 1936
531-535, 536	Evans	March-June 1935	July 1936
628-630	Cline	Feb.-Dec. 1935	May 16, 1936
652	Cline	June 1935	May 9, 1936
654-655	Cline	Jan.-March 1935	May 19, 1936
657-658	Cline	Spring 1935	May 19, 1936
679-684	Bradshaw	Feb. 1935-April 1936	Dec. 19, 1936
754-757	Steiger	Dec. 1935	June 1936
758-759	Steiger	March 1935-April 1936	June 1936
803-804	Mosher	March 1936-May 1936	July 1936
1309-1314	Frey	March-May 1935	July 1936

The witnesses referred to in the above table were important witnesses. Their testimony related to material questions of fact.

It is the clearly established rule in the federal courts that, unless a prior statement was made contemporaneously with the happening of the event to which it relates, it may not be used for the purpose of refreshing the recollection of a witness.

Putnam v. *United States*, 162 U. S. 687, 695 (1896);

Maxwell's Executors v. *Wilkinson*, 113 U. S. 656, 658 (1885);

Felder v. *United States*, 9 F. (2d) 872, 874 (C. C. A. 2d, 1925), cert. den. 270 U. S. 648;

Bosselman v. *United States*, 239 Fed. 82, 85 (C. C. A. 2d, 1917);

Nardi v. *United States*, 13 F. (2d) 710, 711 (C. C. A. 6th, 1926);

Tibbitts-Hewitt Grocery Co. v. *S. E. Lux, Jr., Mercantile Co.*, 5 F. (2d) 549, 551 (C. C. A. 8th, 1925).

The case of *Putnam* v. *United States*, 162 U. S. 687 (1896), is squarely in point. That case holds that it is reversible error for a court to permit Government counsel to attempt to refresh the recollection of a witness in a criminal case by reference to prior grand jury testimony unless such grand jury testimony was given at a time nearly contemporaneous with the event to which it related. Upon this point this Court said:

> "It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum. • • •
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> • • •
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> "The very essence, however, of the right to thus refresh the memory of the witness is, that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occur-

> rence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time.
>
> • • •
>
> "Our conclusion, therefore, is that the exception to the action of the court in allowing the use made of the minutes of the grand jury was well taken, and that there was prejudicial error in this particular. • • •." (162 U. S. at 694, 695, 707.)

The doctrine announced in the *Putnam* case is founded upon sound policy. Unless the testimony before the grand jury is nearly contemporaneous, there is no "reasonable probability that the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing" (162 U. S. at 696-7).

The Government asserts (B. 118) that there was no prejudice to the respondents in the case at bar, and that the *Putnam* case is therefore not controlling. This is unsound, for the ruling of the *Putnam* case is that error of this sort is prejudicial *per se* and requires a reversal. And the prejudice to respondents in the instant case is obvious, as is pointed out below.

The Government further argues (B. 118-120) that the *Putnam* case is bad law, and asks this Court to overrule the decision therein which has been followed in a long line of lower federal court decisions. It is submitted that there is no justification for any such drastic change in the federal rule. The need for that rule is amply indicated in the instant case. The danger of using for refreshment detailed material compiled a year or more after the occurrences to which it related is obvious.

The record in the case at bar discloses that the alleged grand jury testimony of witnesses was repeatedly used in the manner and for the purpose condemned by this Court in the *Putnam* case. As in the *Putnam* case, the testimony before the grand jury was incorporated verbatim or paraphrased in the questions which were asked by Government counsel of their witnesses. As in the *Putnam* case, the testimony before the grand jury was used not to impeach but to refresh the recollection of witnesses.[1] As in the *Putnam* case, the witnesses were important witnesses, and their testimony dealt with vital questions. The question here considered is the same as that disposed of in the *Putnam* case, and should receive the same answer.

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[1]See *Nardi* v. *United States*, 13 F. (2d) 710, 711-2 (C. C. A. 6th, 1926).

IV.

THE ARGUMENTS MADE TO THE JURY BY GOVERNMENT COUNSEL CONSTITUTED REVERSIBLE ERROR.[1]

The Circuit Court of Appeals, having reached the conclusion that the judgments of conviction must be reversed upon other grounds, refused to determine whether arguments to the jury by Government counsel constituted prejudicial and therefore reversible error. It did, however, condemn the arguments as follows:

> "The Government does not undertake to justify much of the argument and misconduct complained of, but it earnestly insists that any error committed is not of a reversible nature. As the case is to be reversed, there seems no occasion for us to make a determination in this respect. We shall merely express the opinion that some of the argument complained of was highly improper and that, taken in connection with the misuse of the Grand Jury testimony, heretofore discussed, would present a very serious obstacle to the affirmance of the judgment." (R. 3950).

The arguments here complained of fall into three classifications as follows:

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[1]This point was raised in the Circuit Court of Appeals by Assignments of Error No. 37-40, inclusive (R. 2543-51). The Circuit Court's comments thereon appear at R. 3949-50. The question is presented both by the petition in No. 346 (p. 2, n. 1) and the cross-petition in No. 347 (p. 3).

A. Appeals to class prejudice.

In an apparent studied effort at the opening of the trial to impress the jury with a fear of corporate power and its overwhelming financial influence government counsel told the jury:

> "Now, of course, again speaking generally, we find in this conspiracy, as you might expect, some of the biggest men—speaking now of big in the way of controlling vast volumes of financial influence—some of the biggest men in this country in the oil business, involved in this conspiracy.
>
> • • •
>
> "Not only, gentlemen of the jury, is this prosecution actuated by the Government because of the injury done to the public, but because of the fact that it is a terrible thing that a group of influential, wealthy millionaires or billionaires should take over the power, take over the control, the power to make prices, and to want to make them. That is the terrible thing, and the thing which the law denounced and was intended to prevent. I would like to have you carry that with you throughout this trial, because it is, after all, the very thing that the Sherman Anti-Trust Act was intended to prevent" (R. 87, 90-91).

And then, lest the jury forget, counsel addressed that body in their closing arguments as follows:

> "A hundred lawyers employed—the very cream of the American Bar, the very best legal talent that these people can obtain—every one of them working night and day with suggestions as to how the red herring can be drawn across the clear cut issue of this case.
>
> • • •

"So, in this case, don't let's justify for one moment that kind of popular attitude towards law enforcement—taking it for granted that these more powerful people are above the law and can't be reached and can't be brought to book.

"And I am going to read you a quotation for a moment, delivered from a Speech of Chief Justice Ryan of this State—one of Wisconsin's greatest jurists, and one of the greatest Judges this country ever had; a veritable genius, I am told. And this isn't law, but this is a part of his address, given away back in 1873—I suppose, before any of you gentlemen were born. And I want you to note the prophecies that are in these words. 1873—about twenty years, seventeen years before the Sherman Act was passed. And he said this, right over here in this law school of Wisconsin, at a graduation day:

> " 'There is looming up a new and dark power. I cannot dwell upon the signs and shocking omens of its advent. The accumulation of individual wealth seems to be greater than it ever has been since the downfall of the Roman Empire. The enterprises of the country are aggregating vast corporate combinations of unexampled capital, coldly marching, not for economic conquests only, but for political power. For the first time, really, in our body politic, money is taking the field as an organized power. The question will arise'——

And here is the prophecy:

> '——The question will arise, and arise in your day, though perhaps not fully in mine, which shall rule, wealth or man? Which shall lead, money or intellect? Who shall fill public stations, educated and patriotic free men, or the futile serfs of corporate capital?'

"Now, that wasn't an inflaming address. That illustrates the American tradition, and its fear—its fear of corporate power in combination.

* * *

"* * * If the Government can declare war then these oil barons can declare war in Asia when some of their boats are sunk" (R. 2040, 2041, 2044-5).

Thus we have not only highly inflammatory argument, but a definite effort to create class prejudice in the minds of the jury. Instead of a trial of defendants clothed with the presumption of innocence, the jury were led to believe that this was a mere contest between great corporate power and wealth on the one hand, and the public interests on the other, and that the only duty of the jury was to determine which should survive. As said in *Berger* v. *United States*, 295 U. S. 78, 89 (1935), "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence."

It is significant that the jury convicted all the defendants, sixteen corporations and thirty individuals, and that the trial court was thereafter compelled to discharge, on the ground of utter lack of evidence, ten individuals and one corporation, and to grant new trials to fifteen individuals and three corporations.[2] In the light of the court's action, it may well be said, to quote from *Rouse* v. *Burnham*, 51 F. (2d) 709, 713 (C. C. A. 10th, 1931), that the verdict of the jury "is evidence of aroused prejudices against the defendants," or as said in *Chicago & N. W. Ry. Co.* v. *Kelly*, 84 F. (2d) 569, 576 (C. C. A. 8th, 1936), that the action of

[2] R. 2488.

the jury cannot be overlooked "in appraising the probable effect of the argument."

Courts have always been vigilant in the denunciation of attempts of counsel, such as are here involved, to induce juries to rest their verdicts, not upon the evidence presented to them through competent witnesses and documents, but upon the ground that the corporate power and wealth of the defendants is such as to cause them to become a public menace. The effort of Government counsel here was to create in the minds of the jury a hostility toward the defendants, and it was seemingly successful.

In *Panama Electric Co.* v. *Moyers*, 259 Fed. 219 (C. C. A. 5th, 1919), the following argument of counsel was held to be reversible error:

> "• • • The defendant is a rich corporation, with plenty of money, and has attorneys employed by the year, and it, like all other large corporations, resorts to technicalities and subterfuges to keep a man like this plaintiff out of his money, and this company is now preparing to appeal from the verdict that you will render, and it will keep on fighting the case clear to the Supreme Court of the United States, simply because it has plenty of money and the plaintiff has none" (259 Fed. at 220).

In *Brown* v. *Walter*, 62 F. (2d) 798 (C. C. A. 2d, 1933), the court in reversing the judgment said:

> "• • • Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defense. A judge, at least in a federal court, is more than a moderator;

> he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary * * *" (62 F. [2d] at 799).

In *Read* v. *United States*, 42 F. (2d) 636, 645 (C. C. A. 8th, 1930), the defendants were convicted of misapplying the funds of a National Bank. In his argument to the jury Government counsel referred to and emphasized the fact that the Reads possessed a fortune, and that it was made out of the bank they had seemingly wrecked. Such remarks were held to constitute prejudicial error.

Cf. Mutual Life Ins. Co. v. *City Nat. Bank*, 86 F. (2d) 660 (C. C. A. 7th, 1936), dealing with argument not more reprehensible than that here involved.

See also:

> *Robinson* v. *United States*, 32 F. (2d) 505, 508 (C. C. A. 8th, 1928).

B. Appeals for a conviction regardless of the evidence on the grounds that (a) Government counsel were convinced of the respondents' guilt, and (b) a conviction "was the wish and the desire of the highest officials in the Government of the United States."

Government counsel further addressed the jury as follows:

> "And I ask you, gentlemen, if you want to encourage them to go on in their arrogant, high-handed, cruel, powerful way, and if you want to encourage other industries made up of the same type of men,—eager, grasping men, to take the law in their own hands and rig the price against the

smaller man, then, I think the way to do it is to acquit them and let them go out and laugh up their sleeves that they did it and got away with it.

"But if, on the other hand, if you have respect for the law—and I know you have—and have pride in our American tradition and the sense of justice—that is a wonderful word, 'justice', for all classes, and if you understand this evidence, and I know you do,—I have looked right in your eyes and I have seen you watch piece by piece this evidence, then gentlemen, you are going to bring in a verdict of guilty against these sixteen companies and these thirty-six individuals that rigged this market for their own aggrandizement and financial return. And I confidently leave it with you, feeling that you will not let your Government and the United States and its citizens and society down.

• • •

"Now, if anybody doubts, if anybody has the least shadow of a doubt about the fact that these men [referring to Government counsel] believe to the bottom of their hearts in the justice of the cause that they espouse here, I can disabuse their minds of that doubt at any time. They have been aggressive, and they have been forceful; their movements here have been intelligent, well-timed; and, as I said, they have come into this court room morning after morning, worn and tired almost to the breaking point. And it seemed to me that, I some times got the feeling, coming as they did then before you to present this evidence and this case, they were something like the Crusaders of old, saying, 'God wills it, God wills it.'

• • •

"You have heard a good deal here about the injustice,—I think that was the word that was used,

—of the Government of the United States, or those who represent it here, in bringing these defendants to trial. I would like to talk about that term, 'What they were doing' after while,—what they were doing being what the Government wanted them to do, especially the Department of the Interior.

"Now, just between yourselves, do you honestly think that these boys here [indicating counsel at Government table] fired with the enthusiasm of crusaders, as I say, and having given to this case every ounce of mental and physical strength they have, and I myself have contributed, also, would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?

"Mr. Brazeau: May it please the Court; I want to take an exception to the remarks of counsel on that as highly prejudicial and improper.

"Mr. Crawford: I don't think it is, if the Court please. That was referred to many times in the trial of this case.

"Mr. Brazeau: He is referring to the wishes of the highest officers of the United States. The highest officers who are available to them to come here and testify. I want an exception to those remarks.

"The Court: I don't see that there is anything objectionable—there is nothing objectionable in those remarks.

"Mr. Brazeau: I would like an exception.

"Mr. Crawford: I don't expect to get away here without being called a few times. I am going to try to do what I am going to do here without any justification for being called.

"Now, just what do you think about it? Do you think these are three or four or five of these young fellows, as they have been calling them, just starting

out on their own, running hog-wild? These are important men. I presume you all know they are engaged in a very important business, a business, the operation of which is almost a necessity in this country today. You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them, against their wishes, or that the Secretary of the Department of the Interior would allow us to do it, if he didn't want it done? And if he wanted it done it was because he believed, as did the other men in Washington, that there was a violation of law here, so outstanding and so withering and far-reaching in its effect that something ought to be done to stop it; and by that to tell the people of his country that you can't do these things and get away with it.

"Mr. Brazeau: May it please the Court, we can't sit here and let those kind of remarks to be made to the jury, and have this prosecution backed up by what counsel is representing to be the opinion of somebody in a higher place, without a syllable of evidence to support it.

"Mr. Crawford: I am satisfied you should make an objection, but I am not satisfied to have you break in on the argument.

"Mr. Brazeau: I am giving my reasons for objecting, and I ask the court to instruct the jury to disregard those remarks of counsel.

"The Court: What remarks?

"Mr. Brazeau: The remarks that the prosecution is backed up by the opinion of someone that it should be brought, somebody outside of the——

"The Court: I suppose we have a right to assume that they are here under the instructions of the Attorney General of the United States.

"Mr. Dorr: Not of the Secretary of the Interior; that is not proper.

"The Court: Just a minute. These men are here as government employees, sent here undoubtedly by the Attorney General.

"Mr. Crawford: In addition to that, if the Court please——

"Mr. Thomas: My objection is this: that counsel is making a statement to the jury that is not supported by the testimony, to the effect that the Secretary of the Interior, as he spoke, is sanctioning this proceeding. ow that is not in this case. For that reason I object to it, and I ask the court to instruct the jury to disregard it.

"Mr. Crawford: Nobody claims that anybody testified, in so many words, to that, but it is a proper inference to be drawn and a proper argument to be made, where it is claimed here by all the defendants' counsel who spoke that what was done here that is now charged to be a violation of law, was done with the consent and approval of the Secretary of the Interior. And I am saying now to the jury that it wasn't so done, the very situation that we are in was a proper one for consideration.

"Mr. Thomas: I take further exception to the statement that counsel just made.

"The Court: Objection overruled.

"Mr. Thomas: I would like an exception, your Honor.

"The Court: You may have an exception.

* * *

"Mr. Crawford: * * * The law—of course, I might say, as I started to say when I spoke about the newspapers, that governments, empires, dynasties have been shattered and broken to the ground—and this country of ours, gentlemen of the jury, is now being shaken to its very foundations by the kind of thing that is alike to what is represented in this

law suit. Whether we survive or perish is going to depend very largely upon whether or not, in the language, I think, of one of the greatest statesmen that ever lived, 'Malefactors of great wealth'—

"Mr. Thomas: Now, if the Court please——

"Mr. Crawford: (Continuing) ——people with great power——

"Mr. Thomas: I except to the statement of counsel, for the reason that it is improper and prejudicial. I ask the Court to rebuke the counsel, and I ask the Court to instruct the jury to disregard it. This case is not to be decided upon the principles of malefactors of great wealth——

"Mr. Crawford: I don't ask it to be. The Court, I think, cautioned the jury right at the beginning of the trial of this case against being influenced by such statements.

"The Cour . Yes, and I shall later in my instructions.

"Mr. Thomas: And may I have an exception?

"The Court: Yes, you may have. I will cover that matter in my instructions.

"Mr. Crawford: When combinations or corporations having the financial and the money power that these corporations have here, go out and take the law into their own hands and operate their business regardless of the desire of the Government, and without any consideration for the under-dog or the poor man, then we can do one thing or another. We are going to stop it, as our forefathers stopped it before us and left this country with us as it is now, or we are going down into ruin as did the Roman Empire——

"Mr Thomas: I object to the statement just made by counsel,——

"Mr. Crawford: I don't know why you should object to that.

"Mr. Thomas (Continuing) ——for the reason that it is prejudicial; it is not legitimate argument and I ask the Court to rebuke counsel and instruct the jury to disregard it.

"The Court: Objection overruled. Proceed with your argument.

"Mr. Thomas: I wish an exception.

"The Court: You may have an exception.

* * *

"Mr. Crawford: * * * But if you should say they are not guilty—I am going to be perfectly frank with you, just like I would if I was talking to you out on a street corner. If you are going to say they are not guilty on this evidence, which is so overwhelming and overpowering that it doesn't even leave the trace or the shadow of a doubt—if you are going to say they are not guilty on this evidence, then you take the responsibility I won't; you get an alibi; I won't.

"I am very frank and very bold in talking to you like that, am I not? I am that way, because I think that is the right way to look at it. Do you want to say that the vast sum of money that has been spent by the Government here—and not in payment of lawyers, either—running into hundreds of thousands of dollars, in trying to get before you the facts in this case, should be thrown to the winds and these men should go clear, and the world and the nation should be told that these combinations of capital can go out and take the law into their own hands, and they can rig any market they please? If you do—why, all right. I will get along. If you can afford to pay thirty cents or forty cents or fifty cents a gallon for gasoline, why, I will get a little once in a while, too" (R. 2145, 2356, 2360-2, 2365-6, 2366-7).

The foregoing remarks of Government counsel were so plainly destructive of that fair and impartial trial to which the defendants were entitled, as to compel the presumption that such remarks prejudicially affected the minds of the jury. Indeed, as said in *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318 (1929):

> "* * * That the quoted remarks of respondent's counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument * * *."

Quite in point is the following excerpt from *Lowdon* v. *United States*, 149 Fed. 673 (C. C. A. 5th, 1906), wherein the judgment of conviction was reversed:

> "In the second excerpt from the district attorney's argument, he asserted, in effect, that if a juror decided that the defendants were not proved to be guilty, when he returned home, 'the neighbors * * * might conclude that the jingle of the broken bankers' unlawfully and illy gotten gold' in his pocket had influenced his action and decision. The plain meaning was, if you decide to acquit, your neighbors will say you have been bribed with money—with the 'illy gotten' money of the defendants. Although we acquit the learned district attorney of intending any threat, a juror unacquainted with criminal procedure might reasonably have concluded that he was warned against a probable charge of receiving a bribe or of conspiracy.
>
> "In the case of People v. Mull, 167 N. Y. 247, 60 N. E. 629, the court of last resort in New York reversed the judgment of the trial court on account of the argument of the prosecuting attorney, although the court said that the 'evidence in the record

was ample to sustain the verdict.' The argument of the prosecuting attorney in that case was that 'a failure to convict cannot fail to excite widespread comment and indignation among the whole body of citizens of this country.' In his address, the attorney said:

> "'If there is a man who sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime, my judgment of his character is not at all correct. * * * It is no wonder that your neighbors have concluded that the integrity and decency of this panel of jurors, instead of Archie Mull, is on trial here today.'
>
> "The court held that this speech being permitted made it doubtful 'whether the defendant had been fairly convicted,' and the judgment was reversed." (149 Fed. at 678).

In *August* v. *United States*, 257 Fed. 388 (C. C. A. 8th, 1918), wherein the defendant was convicted for offering a bribe in connection with the physical examination of a person to be inducted into the military service, the following remarks of Government counsel were held to constitute reversible error:

> "'* * * Gentlemen, this occasion and this prosecution is more grave than were it a prosecution against some one for having attempted to corrupt his honor on the bench, though in such a case only the immediate litigants involved would be directly interested or affected. *But today, gentlemen, the world is engaged in a war, the whole world is engaged in a war for humanity; a war which holds in its balance the very future of the race; a war for the rights, the*

sacred rights, of man, and the honor of womanhood, and the security and sanctity of little children; and we are here engaged in the prosecution of one who, as I am convinced, was willing to place his influence and his efforts and his filthy gold in the scales against those things which all men hold most dear.

" 'This prosecution, gentlemen, will not affect only St. Joseph. It will not only affect Buchanan county. It will not only affect northwest Missouri, and reflect either dishonor or credit upon her; but the result of you gentlemen's deliberations will be heralded to every nook and every corner of this land; yea, and in some way I doubt not it shall waft its way to the agents of hell opposed to us across the mighty waters, and there, gentlemen, the verdict of this jury will be read and heard by the war lords of Germany as a beat from the pulse of the American people. So I say that the gravity of this occasion cannot be measured, and I trust gentlemen, that you will consider this case carefully—that you will consider very, very deliberately.' " (257 Fed. at 393).

In *Hale* v. *United States*, 25 F. (2d) 430 (C. C. A. 8th, 1928), a criminal case, the following, among other remarks of Government counsel, were held to constitute reversible error:

" 'You should say by your verdict as courageous men, decent men, that they shall hang by the neck until they are dead, and you will then meet the plaudits of the people of this great state——'

"To these remarks objection was made, but an exception was not preserved. However, we deem it necessary to restate the well-known rule that cases should be tried upon the evidence presented, and jurors should not be diverted from the exercise of a dispassionate judgment upon the merits through fear

of popular denunciation or hope of popular approval. Appeals of prosecuting officers of this nature have met with frequent and consistent disapproval." (25 F. [2d] at 440).

See also:

Robinson v. *United States*, 32 F. (2d) 505, 508 (C. C. A. 8th, 1928).

In *Nations* v. *United States*, 32 F. (2d) 598, 600 (C. C. A. 8th, 1929), the judgment of conviction was reversed because Government counsel impressed upon the jury "the attitude of the press" toward defendant.

In *Turk* v. *United States*, 20 F. (2d) 129 (C. C. A. 8th, 1927), a criminal case, the court said:

"• • • It is as fatal to a fair trial and a lawful conviction of a defendant by a jury that their verdict was for a wrong and unlawful reason as that it was caused by incompetent evidence or an erroneous charge. If the jury did not believe beyond a reasonable doubt from the evidence before them that the defendant had possession of or sold some beer at the necessary time and place, he could not be lawfully convicted because he was a wholesaler rather than a retailer, or because the release of a guilty man by a jury 'is simply a red flag as you might say to others to engage in law violations,' or because the defendant has made money. The jury ought not to have been urged by counsel to convict the defendant for any of these alleged reasons and counsel must not expect approval by the court of verdicts sought or obtained on such grounds • • •." (20 F. [2d] at 131).

C. Assertions of personal knowledge in contradiction of the record to discredit an important defense witness.

We deem it necessary here to notice but one more item of misconduct on the part of Government counsel. It is contained in the following excerpt from the closing arguments to the jury:

> "I want to refer in a moment to something that made an impression on me.
>
> "You know, we lawyers have to depend—most of us are kind of tough guys. We have our own way of talking about witnesses. And one thing that we very often say and talk about is the three classes of liars. There is the plain liar, the damn liar, and the expert witness. And of all of them, the expert witness is the worst.
>
> "There were a few of them here. There was Swensrud, the representative of the Standard of Ohio; there was Van Covern, and I think there was another one.
>
> "But I just didn't think much of Swensrud's whole testimony, especially after I found out that he was giving testimony that they could ship gasoline in 1935 and in 1936 up the Mississippi River to St. Paul. I happen to be around the Mississippi River quite a little, and know quite a lot about it. In 1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona—because the Government was putting in these dams for the purpose of creating the nine-foot channel that you have read so much about. They had concrete clear across the river, spaced in so many ways that, as I say, you just couldn't get a rowboat up there. When Swensrud talked about gasoline going up that river, where I knew, because I lived there and was around there,

that it couldn't be done, I just thought——" (R. 2377-8)

The prejudice arising from the unsworn testimony of Government counsel is peculiarly damaging because the statements are not true. The Annual Report of the Inland Waterways Corporation to the Secretary of War for the calendar year 1935 (an official Report of the United States Government of which this Court may take judicial notice) contains the following statement:

> "The conditions of the Mississippi River during the year 1935 were very favorable. We suffered no serious delays due to channel difficulties in any section of the river and this improvement was most noticeable in the upper Mississippi section, which was closed to navigation for a period of about 3 months during the summer of 1934. No serious delays were encountered at any time." (page 7).

That report also discloses that during 1935 approximately 240,215 tons of freight moved by water on the Mississippi River between St. Louis and Minneapolis, Minnesota. (*Ibid*, p. 26.) In 1936 approximately 150,802 tons of freight were handled between those two ports. (Report of the Inland Waterways Corporation, 1936, page 24.) Contrast these facts with counsel's statement that "You couldn't get a rowboat up the Mississippi, north of Winona."

The testimony here referred to was vitally material as establishing such outside competition as would have prevented the respondents from raising prices to artificial and non-competitive levels. Yet the Government counsel undertook, in the role of prosecutor, to disprove it on the basis of his claimed personal knowledge.

The Government counsel went further than this: Swensrud was an important witness for the respondents. He had been appointed by Secretary Ickes as a member of the Petroleum Code Survey Committee on Small Enterprises. As a Government employee he had made investigations of competitive conditions in the Mid-Western area. At the trial he testified extensively as to the facts revealed by those investigations. In the above quoted portions of his closing argument the Government counsel told the jury that it should disregard Swensrud's *entire testimony* on the basis of the counsel's personal belief as to a single fact unsupported by anything in the record. Such conduct has been repeatedly rebuked by the courts, notably in *Berger* v. *United States*, 295 U. S. 78, 88 (1935); *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 319 (1929); *Taliaferro* v. *United States*, 47 F. (2d) 699, 702 (C. C. A. 9th, 1931).

The Government concedes (B. 127) that this remark was "open to substantial criticism." It contends, however, that the statement was withdrawn and the jury instructed to disregard it. It can hardly be said that the effect of the withdrawal and instruction was such as "to remove the evil injected * * * by counsel." (See p. 264, *infra*.) The court said:

> "The jury may disregard it. I didn't hear it. I was thinking about something else.
>
> Mr. Chaffetz: He was talking about the Mississippi River" (R. 2378).

Thereupon counsel immediately returned to his theme and proceeded again to brand Swensrud and the other expert witnesses for the respondents as untrustworthy, saying:

> "Now, if you will let me alone a few minutes, I'll be through. If you don't, like 'Old Man River',

I will just keep rolling along. I don't want to do that.

"Now, I was referring to these witnesses who knew so much. There was Van Covern, Swensrud, and a fellow named J. D. Miller. He was the fellow who never looked at anybody, so you could catch his eye. They knew so much, in the way they were telling it to you, that it is impossible, just impossible to believe that they could know as much as they said they did about it. They just covered too much territory. I think all history, sacred and profane, gives us but one single example of a person who knew everything—and He was not only a man, but He was God. And He gave up His life in a shameful death, upon the cross, between two thieves." (R. 2378).

• • •

As in the Circuit Court of Appeals (R. 3950) the Government does not seriously attempt to justify any of the arguments complained of above. It does, however, call attention to the statement of the Circuit Court of Appeals that "the arguments as a whole do not disclose a picture as prejudicial to appellants as is argued or as indicated by the particular statements referred to" (R. 3949, quoted B. 122).

The respondents submit that the statements made by Government counsel were prejudicial, whether viewed as a whole or individually. In fact one of their assignments of error[1] is addressed to the *entire* argument of the Special Assistant to the Attorney General, W. P. Crawford. We invite the court to read that argument as a whole. It covers some 28 pages of the record. Of those 28 pages there are not five which have anything to do with the

[1]Assignment No. 32, R. 2543.

facts of the case. The remainder of the argument is devoted entirely to meaningless pleasantries, criticism of defense counsel and remarks similar to those quoted above. Far from being mitigated by the remainder of the argument the prejudicial effect of the remarks quoted above was *intensified* by it.[2]

• • •

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[2]As stated above, Mr. Crawford's argument consists of 28 pages, containing some 1317 printed lines. The subjects covered on these pages and the space devoted to each are as follows:

Opening, closing and transitional remarks: 29 lines (R. 2352, *ll.* 34-41, 2353, *ll.* 10-11; 2372, *ll.* 9-14; 2378, *ll.* 39-45, 2379, *ll.* 34-40); Tension and humorlessness of trial: 107 lines (R. 2351, *l.* 39; 2352, *l.* 16; R. 2357, *l.* 37-2358, *l.* 23; R. 2358, *l.* 45-2360, *l.* 8); Compliments 278 lines: to jury (R. 2352, *ll.* 17-22, to marshalls (R. 2352, *ll.* 23-33); to Court (R. 2352, *l.* 42-2353, *l.* 9; 2373, *l.* 45-2374, *l.* 3); to defense counsel (R. 2353, *l.* 44-2354, *l.* 47; R. 2358, *ll.* 24-31; 2367, *ll.* 7-33), to defendants (R. 2353, *ll.* 12-43; 2358, *ll.* 32-40, 2379, *ll.* 14-23), to Government counsel (R. 2355, *ll.* 1-25, 2355, *l.* 34-2356, *l.* 25; R. 2379, *ll.* 24-33), to Government accountants and investigators ("G-Men") (R. 2355, *ll.* 26-33; 2377, *ll.* 12-28), to press R. 2364, *ll.* 3-39); Expressions of solicitude for welfare of jury: 22 lines (R. 2364, *ll.* 9-30); Reminiscences of old time juries: 41 lines (R. 2371, *ll.* 3-43); Reference to "a terrible handicap, a personal one with which you are not concerned at all" which has prevented Mr. Crawford from contributing much to Government case: 4 lines (R. 2356, *ll.* 38-41); *The prejudicial remarks quoted above, and objections to and colloquies regarding same*: 249 lines (R. 2356, *ll.* 26-37; 2360, *ll.* 9-37, 2360, *l.* 38-2362, *l.* 7; 2365, *l.* 4-2365; *l.* 7; 2365, *ll.* 21-42; 2375, *l.* 42-2376, *l.* 14; 2377, *l.* 29-2378, *l.* 22; Objections to and colloquies regarding similar remarks: 56 lines (R. 2362, *ll.* 8-13, 2367, *ll.* 8-22, 2370, *ll.* 23-35, 2371, *l.* 31-2377, *l.* 12); Criticism of defense counsel who made objections: 83 lines (R. 2362, *ll.* 14-19, 2370, *l.* 35-2371, *l.* 2; 2374, *l.* 26-2375, *l.* 41); Warnings against tactics of defense counsel: 164 lines (R. 2356, *l.* 42-2357, *l.* 36; 2362, *ll.* 20-36; 2371, *l.* 44-2372, *l.* 8, 2372, *l.* 24-2373, *l.* 2374, *ll.*

The governing principle is thus stated in *Taliaferro* v. *United States*, 47 F. (2d) 699 (C. C. A. 9th, 1931), a criminal case:

> "'* * * Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not.' Lowdon v. United States, 149 F. 673, 676 (C. C. A. 5th)" (47 F. [2d] at 702).

See also:

> *Hamilton* v. *State*, 97 Tenn. 452, 457, 37 S. W. 194, 195 (1896);

4-25, 2378, *ll.* 23-38, 2378, *l.* 14-2379, *l.* 13); Statement that Government openings [which had leveled charges of fraudulent falsification of trade journals]—"actually sounded like a prophesy, because we seem to have followed it sentence after sentence, and line after line, and word after word.": 14 lines (R. 2363, *l.* 37-2364; *l.* 8); Advice to Jury—to disregard statistical evidence, look only at highlights of case and reach a verdict quickly: 41 lines (R. 2373, *ll.* 14-44, 2379, *l.* 41-2380, *l.* 3); Significance of the case: "the viciousness and horror and the potential possibilities of destruction in what the defendants did": 51 lines (R. 2366, *ll.* 8-20; R. 2366, *ll.* 7-20; R. 2366, *l.* 43-2367, *l.* 6; R. 2372, *ll.* 15-23); *Remarks about "the facts"*: 157 lines (R. 2362, *l.* 20-2363, *l.* 19; 2368, *l.* 7-2369, *l.* 11; 2369, *l.* 33-2370, *l.* 22); *Analysis of "the law"*: 21 lines (R. 2369, *l.* 12-32).

State v. *McGahan*, 48 W. Va. 438, 442, 37 S. E. 573, 574 (1900);

Commonwealth v. *Shoemaker*, 240 Pa. 255, 259, 87 Atl. 684, 685 (1931).

In *Berger* v. *United States*, 295 U. S. 78 (1935), the Court, after stating that the jury has confidence that the obligations resting upon the prosecuting attorney will be faithfully observed, said:

> "• • • Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none • • •." (295 U. S. at 88).

In accord are:

Waldron v. *Waldron*, 156 U. S. 361, 380 (1895);

Latham v. *United States*, 226 Fed. 420, 425 (C. C. A. 5th, 1915);

Read v. *United States*, 42 F. (2d) 636, 645 (C. C. A. 8th, 1930).

• • •

Having set forth considerable portions of the arguments of Government counsel to the jury, which arguments carry their own demonstration not only of inherent power to adversely affect the verdict of the jury, but of real probability that the verdict was so affected, we now turn to consider whether there be any legal principles which would foreclose consideration by this Court, of the question here presented. The Government insists that the question is either not open on the record, or deserves no serious consideration because of inadequate objections, and the

fact that as to such objections as were made, the court took "proper corrective action."

The appellate rule with respect to the need for objections in the trial court, is merely a relative and not an inexorable rule. We think the record shows the requisite objections, but even though that was not the fact, it would not constitute a bar to this Court's review of the question. A similar challenge was made in *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310 (1929), involving alleged prejudicial argument to the jury. In brushing aside the technical contention, this Court said (pp. 318-9):

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See *Union Pac. Ry. Co.* v. *Field*, 137 Fed. 14, 15; *Brown* v. *Swineford*, 44 Wis. 282, 293. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error. *Brasfield* v. *United States*, 272 U. S. 448, 450."

And in *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936), this Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. See *New York Central R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Brasfield* v. *United States*, 272 U. S. 448, 450. * * *"

In support are the following cases:

Aetna Life Ins. Co. v. *Kelley*, 70 F. (2d) 589 (C. C. A. 8th, 1934);

Brown v. *Walter*, 62 F. (2d) 798 (C. C. A. 2d, 1933);

Rouse v. *Burnham*, 51 F. (2d) 709, 713 (C. C. A. 10th, 1931);

N. Y. Life Ins. Co. v. *Doerksen*, 75 F. (2d) 96, 102 (C. C. A. 10th, 1935);

London Guarantee & Accident Co. v. *Woelfle*, 83 F. (2d) 325 (C. C. A. 8th, 1936).

But the Government contends that in any event, the trial court took "proper corrective action." That does not settle the question unless this Court can see that the so-called "corrective action" entirely erased from the minds of the jury all possible harm or prejudice created by the objectionable argument. A similar situation existed in *Mutual Life Ins. Co.* v. *City National Bank*, 86 F. (2d) 660, 663 (C. C. A. 7th, 1936), but the court said:

> "That the District Court made such a valiant effort in this case to remove the evil injected therein by counsel in an effort to avert a mistrial is to be considered. It is to be noted that in each instance

> recited the court acted promptly and correctly instructed the jury that they should not give effect to the matters complained of, which under some circumstances would be deemed to have corrected the evil. We are persuaded, however, that under the circumstances of this case, where, as we believe, at the best, a close fact question was involved, it cannot be said that the jury were not, in spite of the court's admonitions, influenced by such unwarranted conduct of counsel. Nothing remained for the District Court to do that he did not do in an effort to mollify the evil, and the responsibility rests clearly upon the shoulders of plaintiff's counsel."

To the same effect are:

Pierce v. *United States*, 86 F. (2d) 949, 952 (C. C. A. 6th, 1936);

Robinson v. *United States*, 32 F. (2d) 505, 508 (C. C. A. 8th, 1928).

Cf. Throckmorton v. *Holt*, 180 U. S. 552, 567 (1901);

Hopt v. *Utah*, 120 U. S. 430, 438 (1887).

It may very properly be said that the so-called "corrective action" of the trial court in the case at bar, no more met the requirements of a fair trial than that dealt with in *Berger* v. *United States*, 295 U. S. 78, 85 (1935):

> "* * * The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps,

if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

Every interest of justice requires that there be applied to the arguments here under attack, the rule thus stated in *McCandless* v. *United States*, 298 U. S. 342, 347-8 (1936):

> "In this situation, §269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affimatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26."

The same thought is thus expressed in *Little* v. *United States*, 73 F. (2d) 861, 866-7 (C. C. A. 10th, 1934):

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their

verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial. * * *"

While the Circuit Court of Appeals below found it unnecessary to pass upon the point, its comments nevertheless indicate its conviction not only that the record failed to affirmatively show lack of prejudice in the arguments, but that such arguments probably created an adverse effect upon the jury.

The foregoing discussion under this point of our brief, furnishes additional support for the judgment of the Circuit Court of Appeals below remanding the case for a new trial upon other grounds.

V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING NEW TRIALS TO SOME DEFENDANTS AND DENYING THEM TO RESPONDENTS, AND THE CIRCUIT COURT OF APPEALS BELOW SHOULD HAVE SO RULED.[1]

The Circuit Court of Appeals, having reached the conclusion that a new trial must result upon other grounds, refused to pass upon the question whether the trial court had committed reversible error in granting new trials to some defendants and denying new trials to the respondents now before this Court (R. 3945).

The error of the trial court lies in the fact that in denying new trials to respondents, there was left in effect as to them a verdict of guilty without any finding by the jury that they, acting alone and without the cooperation of the defendants who were granted new trials, possessed the power arbitrarily to raise, fix, and control prices and thereby unreasonably restrain trade or commerce. Unless they possessed such power, respondents could not violate the Sherman Law. Power constituted an essential ingredient of the offense. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 375 (1933), and *Standard Oil Co.* v. *United States*, 283 U. S. 163, 176-7 (1931).[2]

The Government argues that the denial of a motion for new trial is not reviewable. This rule has no application here. When the denial involves a fundamental right or

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[1]This point was raised in the Circuit Court of Appeals by Assignment of Error No. 21, R. 2519. The Circuit Court's discussion thereof appears at page 3945 of the Record. It was the fourth question presented by the respondents' cross-petition on No. 347 (p. 3).

[2]See also pp. 165-6, *supra*.

issue, appellate courts have not hesitated to review and reverse. *Dufour* v. *United States*, 37 App. D. C. 497, 510 (1911); *Browne* v. *United States*, 145 Fed. 1, 13 (C. C. A. 2d, 1905).

In fact, the granting of a new trial may constitute a positive duty, and not a matter of discretion of the court. As the court said in *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399 (C. C. A. 6th, 1910), where the denial of a new trial was the sole ground of appeal:

> "* * * It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages * * *" (177 Fed. at 401).

Cf. Spreckles v. *Brown*, 212 U. S. 208, 213-4 (1909).

Such a positive duty *to review* the denial of respondents' motions for a new trial clearly exists in this case. There is nothing in the record to indicate that the verdicts of guilty standing against the respondents are supported by any finding by the jury that the respondents, acting without the aid or cooperation of the defendants who were discharged or granted new trials, possessed the power to raise prices arbitrarily and artificially.

Perhaps the matter can be put most clearly by examining chronologically the way in which this issue developed. In its final charge, the trial court said:[3]

> "• • • If you find that a combination existed and that such combination had the power to raise the price, the amount by which prices may have been affected by the combination is not important under the law.
>
> • • •
>
> "• • • What the law condemns is the power on the part of such group controlling a substantial part of an industry to raise the price if it chooses to do so, and for that reason it condemns and brands as illegal all attempts at price fixing by a group such as I have described. The law condemns the exercise by any combination of the power to raise prices, and so, as I have stated, if you find a combination and that the members of the combination had the power to raise the price, and acted together for that purpose, then I charge you that the combination is illegal, and your verdict should be guilty as to each defendant whom you find to have knowingly participated therein.
>
> "• • • If you are satisfied from all of the evidence that any of the defendants acted together for the purpose of raising the price and that they had the power to raise the price, and did in fact affect the level of prices for gasoline in the ten Middle Western states, including the Western District of Wisconsin, as charged in the indictment, then you may return a verdict of guilty against such defendants.
>
> • • •

[3] R. 2405, 2407-8, 2414.

"If you should find that the defendants and the independent refiners acting in combination with them had the power to raise prices, and that their combination was an illegal one, it does not matter whether or not any of the defendants had any need, immediate or otherwise, for the gasoline which you may find they purchased * * *."

By their verdict on January 22, 1938[4], the jury found that sixteen corporations and thirty individuals had conspired to raise prices and that they collectively possessed power to execute such a conspiracy.

Thereafter, on July 19, 1938, the Court discharged one corporation and ten individuals, and granted new trials to three corporations and fifteen individuals.[5] Such action left the verdict standing as to only twelve corporations and five individuals.

It follows inescapably from the above recital that *the respondents'* possession of power to raise prices (which, under the very charge of the court, was a basic and fundamental issue) never received the consideration of the jury, and that consequently there is no express or implied finding thereon. The jury's finding that the entire group possessed such power to raise prices by no means carried the implication that, if permitted, the jury would likewise have found that respondents, acting alone, possessed such power. The action of the court in discharging certain defendants and granting new trials to others definitely changed the factual situation which existed at the time of the submission of the case to the jury.

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[4]R. 2478-84.
[5]R. 2488-500.

The error cannot be cured by placing the finger upon some evidence which would have supported such a finding, if made. The obstacle here is that *there is no jury finding.* No court can now determine the present issue of the power of respondents to raise prices, without usurping the function of the jury and thereby constituting itself the fact-finding body in this criminal case. Such action would violate the constitutional right of respondents to a jury trial.

The trial court carved out of the jury's verdict four corporations, thus determining, in substance, that they, among others, had not been properly found to have been participants in the conspiracy charged. We need analyze the power of only one of those four: Standard Oil Company (Indiana). That company was granted a new trial after the verdict on the ground that the jury had clearly not given proper consideration to certain "facts and circumstances shown, in some cases, to be highly suggestive of innocence, and in all cases entitled to be considered and weighed." 23 F. Supp. 937, 939. The granting of a new trial to Standard of Indiana, therefore, removed that company from the case as a co-conspirator and restored its former presumption of innocence. It must be so treated in measuring the criminal liability of respondents and the validity as to them of the verdict here under attack. That principle is so thoroughly imbedded in our law as to require the citation of authorities merely for reference purposes. *Bartkus* v. *United States,* 21 F. (2d) 425, 428 (C. C. A. 7th, 1927); *Cofer* v. *United States,* 37 F. (2d) 677, 680 (C. C. A. 5th, 1930); *Morrow* v. *United States,* 11 F. (2d) 256, 260 (C. C. A. 8th, 1926); *Turinetti* v. *United States,* 2 F. (2d) 15, 17 (C. C. A. 8th, 1924); *Feder* v.

United States, 257 Fed. 694, 697 (C. C. A. 2d, 1919); *72* A. L. R. 1188; and *97* A. L. R. 1317.

The Government disputes this, but the cases upon which it relies (B. 157) rest upon their own peculiar facts and do not purport to upset the rule for which we contend. To illustrate, one of the cases cited by the Government is *Motes* v. *United States,* 178 U. S. 458. The ruling in that case is thus correctly construed in *Cofer* v. *United States,* 37 F. (2d) 677, 680 (C. C. A. 5th, 1930):

> "* * * The rule in conspiracy cases is that, when the conviction of all the conspirators except one is reversed, the conviction of that one should also be reversed, since, in conspiracy cases, at least two must be convicted or none. Otherwise it might well be that the sole convicted defendant might be the only one ever convicted in violation of this rule.
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> "The government relies upon the case of Motes v. United States, 178 U. S. 458, 20 S. Ct. 993, 44 L. Ed. 1150, to the contrary. In that case there was a reversal as to all the defendants who are tried, except the appellant Motes. Motes, upon the trial, testified that he and one Bob Taylor, who had pleaded guilty to the indictment, had killed Thompson, the victim of the conspiracy, and that none of the other defendants who were on trial with him, had anything to do with the conspiracy or the killing. The Supreme Court said that, as the proof of the guilt of Motes was conclusive, the unwarranted admission of a statement made by Bob Taylor, though improper, ought not to work a reversal of the judgment against Motes in view of his evidence that together with Taylor he had killed Thompson in pursuance of the conspiracy * * *."

The action of the trial court below in granting new trials as to some defendants and denying them as to respondents, necessarily involved the court's determination that respondents did possess the power, although the jury had never considered that issue. This decision, as we have already pointed out, resulted in denying to respondents their right to have that issue determined by a jury in a new trial. It is just as essential that the issue of the power possessed by these respondents should be submitted to and determined by a jury as it was that the issue of the power of all the defendants placed upon trial be submitted to the jury prior to verdict. The court's charge at that time recognized that it was *for the jury* to decide whether the defendants possessed the necessary power. Obviously, after granting new trials to so formidable a group of the defendants, the court lacked power to determine such issue as a question of law and against respondents. The case is analogous to *Nash* v. *United States*, 229 U. S. 373, 379-80 (1913), which also arose under the Sherman Law. In that case there was a reversal because the instructions of the court permitted the jury to rest its verdict upon the employment of means which the prosecution no longer charged or which were not established by the evidence. In the case at bar, the verdict as to respondents is left to rest upon an issue never considered or passed upon by the jury. The prejudice in both cases is legally the same, and the corrective remedy to be applied, *viz.*, a new trial, must therefore be the same.

The record shows that Standard of Indiana alone possessed such power as would make it impossible for any group such as the respondents to raise prices without its agreement and cooperation.

The Government's appraisal of the power of this corporation, and of the need of establishing its participation in the conspiracy, if a verdict of guilty was to be secured, first appears in the following excerpt from the indictment:[6]

> "The States of Michigan, Wisconsin (including the Western District thereof), Minnesota, North Dakota, South Dakota, Iowa, Illinois, Indiana, Missouri, and Kansas compose one of the great marketing areas for gasoline in the United States. Said area comprises the gasoline marketing territory of defendant Standard of Indiana, and is sometimes known as the 'Standard of Indiana territory' by reason of said defendant's dominant position in the distribution of gasoline in each of said states * * *."

Again in their closing arguments to the jury, Government counsel said:[7]

> "There can't be any doubt about the power, and I am not going to dwell very long on it. Just think of the power of the Standard of Indiana alone, the great octopus sprawling over that territory with its powerful tentacles in every town and hamlet——
>
> * * *
>
> "It sells a billion gallons of gasoline a year, gentlemen. That is in the record, a billion gallons of gasoline a year. I can't conceive a billion gallons of anything, or a billion anything. I can't conceive a million. But its yearly sales are multiplied by a thousand times a million.

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[6]Indictment, par. 5, R. 8.

[7]R. 2408.

> "It furnishes sore competition when it acts alone, * * *."

Standard of Indiana operates 4,000 bulk stations in the area covered by the indictment. It is the largest major oil company doing business in the area. The record reveals that no company can obtain a higher price than that posted by Standard and that Standard's strategic position in the area is a complete brake upon the power of any other company or group to raise prices without Standard's cooperation.[8]

To summarize: The Court below, while granting new trials to one group of defendants because the evidence as to them had not been given proper consideration by the jury, nevertheless denied a new trial to respondents, although the jury never considered the evidence as to respondents' power to raise prices. This Court has no more power than the trial court to hold that the jury was legally bound to find that respondents did possess power to raise prices. A new trial furnishes the only remedy. The applicable rule is thus stated in *Patterson* v. *United States*, 2 Wheat. (15 U. S.) 221, 225 (1817):

> "* * * A verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the

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[8]Swensrud, R. 1388; see Shatford R. 1085; Marshall, R. 1233, 1246-7. Add to Standard's power that possessed by Globe Oil & Refining Co. (Kansas) and Barnsdall Refining Corporation (Def. Ex. 1028, R. 3812), against whom also the verdict has been set aside, and it becomes evident that respondents, as a separate group, so demonstrably lacked power to raise prices that no court could properly withdraw the determination of that issue from the jury, and decide it as a question of law adversely to respondents.

> end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict" (2 Wheat. at 225).

To the same effect are *Bennett* v. *Butterworth,* 11 How. (52 U. S.) 669, 675 (1850), and *Hodges* v. *Easton,* 106 U. S. 408, 412 (1882).

Cf. Gasoline Products Co. v. *Champlin Refining Co.,* 283 U. S. 494, 497-501 (1931).

We think that we have demonstrated the power of this Court to deal with the question here presented. The Government argues that no review may be had because respondents failed to base their motions for new trial upon the ground that the granting of a new trial to any corporate defendant would require granting new trials to all defendants (R. 155). There was no duty resting upon respondents to anticipate and instruct the court as to its duty in disposing of the several motions for new trial. In any event, the motions for new trial sufficiently raised the point by stating as to each respondent "that the verdict of the jury is contrary to law." When the court, therefore, granted new trials to some, he was bound to determine whether that action would, as to those denied new trials, leave the verdict as to the latter "contrary to law" because such verdict contained no finding of a material issue, *viz.*, whether the respondents who were denied

a new trial, possessed power to raise or fix prices. It is clear that on the record the question was properly raised. But the question is so fundamental, and the error so prejudicial, that this Court would be warranted in noticing it although not clearly nor technically raised below.

The Government's second contention is that in the absence of evidence to the contrary, it must be presumed that the trial court took into consideration the results flowing from the granting of new trials to Standard of Indiana and other defendants (B. 154). Respondents do not challenge the accuracy of that view but it has no pertinency here. The fact remains that the court, by granting new trials to some defendants and denying such new trials to the respondents, left the verdict to stand as to them without any finding by the jury that such respondents alone possessed power to raise or fix prices. Respondents are even willing to assume, *arguendo*, that, as now contended by the Government, the trial court undertook to and did find that the respondents possessed the necessary power. That assumption merely emphasizes the error which the court's action created. It possessed no authority to decide such an issue. It was a matter for the jury, and was so recognized by the trial court when it left that issue to the jury under specific instructions as to all the defendants whom they should find guilty. The jury was not instructed to, and therefore had no occasion to consider or determine the power of the respondents. No court can now substitute its judgment for that of the jury upon that issue.

The contention of the Government that for appellate purposes, the Standard of Indiana, which was granted a

new trial, must still be treated as linked to the conspiracy, (B. 153) is but to assert that in passing upon the rights of these respondents, this Court must assume that an unconvicted defendant is guilty as charged in the indictment. Of course such a contention will not stand up. The verdict as to Standard of Indiana was set aside, and that action placed that defendant in the status of one never yet convicted. The power of that defendant to fix or raise prices can no more be resorted to for the purpose of adding to the power of the respondents now before this Court, than the power of an untried defendant.

It is true that in denying Standard's motion for a directed verdict, the court was of the view that there was enough evidence to implicate Standard. The granting of a new trial to Standard, however, could only rest upon the ground that the jury had not properly determined its guilt. Otherwise there would have been no occasion for the court to assert that the jury had not given proper separate consideration to Standard.

The Government relies upon *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, as showing that no review of a denial of a motion for new trial can be had where the trial court does not set forth the grounds for denial. It is significant, however, that in that very case this Court said (p. 480):

> "If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error it was at liberty under its rules to notice the error although not assigned;[9] * * *"

[9]Rule 10 (4) of the Circuit Court of Appeals for the Seventh Circuit provides: "The court may notice a plain error not as-

Under no proper appraisal of the above case can it be said to constitute a bar to the consideration of the question herein presented, for our question goes to the very validity of the verdict by demonstrating that it rests upon findings which did not embrace all material issues in the case. That was not the situation in the *Fairmount Glass Works* case, *supra*.

Nor does the recent decision of this Court in *William Helis* v. *Ward*, No. 68, decided December 18, 1939, constitute a bar to consideration of the question we present. In that case this Court refused to consider whether it should order a new trial, because the petition for certiorari did not present the question sought to be raised.

The foregoing discussion is submitted as an additional ground in support of the judgment of the Circuit Court of Appeals below.

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signed." See *Reliable Incubator & Brooder Co.* v. *Stah*, 105 Fed. 663, 668. A similar rule obtains in this Court; and in each of the other Circuit Courts of Appeals except the Eighth. For examples of the application of these Rules see *United States* v. *Tennessee & C. R. Co.*, 176 U. S. 242, 256; *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S 547, 552; *Weems* v. *United States*, 217 U. S. 349, 358; *Mahler* v. *Eby*, 264 U. S. 32, 45; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108. Compare *Pierce* v. *United States*, 255 U. S. 398, 405-406.

PART TWO

THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO DIRECT THE TRIAL COURT TO DISMISS THE INDICTMENT.

VI.

THERE WAS A FATAL VARIANCE BETWEEN THE AGREEMENT CHARGED IN THE INDICTMENT AND THE AGREEMENT OF WHICH THE GOVERNMENT CLAIMS THERE WAS PROOF TO GO TO THE JURY.[1]

The Sixth Amendment to the Constitution requires that a defendant in a criminal case be informed of the charge made against him. It follows that under it a defendant cannot be convicted of a crime materially different from that described in the indictment. The accused must be protected against another prosecution for the same offense and must be apprised with certainty of the accusation against him so that he may not be taken by surprise.[2]

A. The charge described in the indictment.

Probably in no other Sherman Law case has the Government so radically shifted its ground as to the agree-

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[1]This question was raised in the Circuit Court of Appeals by Assignment of Error Nos. 1-16 (R. 2515-7). The Circuit Court decided it adversely to the respondents (R. 3936-8). It is the second question presented by the respondents' cross-petition in No. 347 (p. 2).

[2]*Berger* v. *United States*, 295 U. S. 78, 82 (1935); *Meyers* v. *United States*, 3 F. (2d) 379, 380 (C. C. A. 2d, 1924); *United States* v. *Byers, et al.*, 73 F. (2d) 419, 422 (C. C. A. 2d, 1934); *Kutler* v. *United States*, 79 F. (2d) 440, 442 (C. C. A. 3rd, 1934); *Malaga* v. *United States*, 57 F. (2d) 822, 825 (C. C. A. 1st, 1932).

ment which it claimed the defendants had entered into and which it claimed was illegal. In the indictment, as we shall presently show, the prosecution charged an agreement by which the respondents were to procure the publication of false market quotations in trade journals or "market journals", substituting in these quotations higher prices paid by them to independent refiners for the prices actually being charged in the transactions between independent refiners and jobbers which the market quotations purported to reflect. This charge, which Government counsel outlined in the opening to the jury,[3] was affirmatively disproved and abandoned. Nevertheless the trial court permitted the case to go to the jury on the theory that the allegation of an agreement to falsify the published spot market price was immaterial.

What is the scheme described in the indictment? Stripped of the verbiage of inducement, motive and consequential result, the charge is this:

First, the respondents, a group of integrated oil companies, were to buy from small non-integrated refiners in the Mid-Continent field and in East Texas a portion of the gasoline refined by them in amounts relatively small compared to their own output. They were to pay for these relatively small purchases uniform, high, arbitrary and non-competitive prices agreed upon by members of the group.

Second, the respondents would procure the falsification of the market quotations of spot sales of gasoline in the Mid-Continent and East Texas fields published in the trade journals—concededly an important instrumentality of com-

[3] R. 105-106.

merce. Left unrestrained, these quotations would have reflected the prices paid in sales to *jobbers* and *not* the prices paid in *inter-refinery* sales, such as are mentioned above, to the respondents. By the agreement these market quotations were to be falsified by the publication of the "wrongfully and artificially raised and fixed prices for gasoline paid by the major oil companies as aforesaid in the said East Texas buying program and Mid-Continent buying program" in the guise of genuine quotations of competitive transactions between independent refiners and jobbers.

In short the device was for the respondents to pay higher than the actual spot market price for their relatively small purchases from the small refiners and then to secure the substitution of such prices in the market quotations for the lower prices actually being paid by jobbers in competition in the spot market sales. The alleged motive was that the respondents would benefit in their other transactions by the falsification of the market quotations.[4]

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[4]The indictment also charges curtailment of production by independent refiners at the behest of the defendants and asserts that the defendants' purchases amounted to 50% of the independent refiners' production.

The evidence refuted the charge of curtailment of production conclusively and the Court of Appeals so held. The Government has abandoned the charge in this Court.

If engrossment was intended to be charged, it was clearly negatived by evidence showing that the defendants purchased only 15% of the production of the Mid-Continent independent refiners named in the indictment and only 14% of the production of the East Texas independent refiners named in the indictment; by the fact that such refiners owned only 37.6% of the 1935 operating independent refiner capacity in the states supplying the Mid-Western area; by the fact that despite the statements of one broker called by the Government, brokers in general were able to purchase many thousands of cars of gasoline from independent refiners including those named

B. The affirmative disproof of the charge in the indictment.

On this charge the Government went to trial. To its manifest and complete surprise, the essential features of the charge turned out to be not only unsupported by the evidence, but negatived by it. The facts proved to be that the trade publications had based their quotations on jobber—non-refiner—transactions just as they purported to do. Instead of the prices paid by the respondents to the non-integrated refiners being higher than the range of prices prevailing in the spot market, they were at and, in a substantial proportion of the cases, lower than the lowest quotations of the trade journals.[1] Instead of being uniform, they displayed considerable variations, as many as three or four different prices sometimes being paid on the same day.

The evidence affirmatively showed that no such scheme as that charged in the indictment existed; that the respondents' purchases had not been accompanied by any falsification of the trade journal quotations either with or without

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in the indictment and made a volume of purchases during the spring of 1935 greater than during the pre-buying program period (R. 1638, 1640); by the fact that the gasoline purchased was distress gasoline, for which there was no other market except on a distress sale basis; and, most of all, by the fact that prices did not rise as much in the market claimed to have been affected by respondents' buying as they did outside that area (R. 1462).

As we have already noted (pp. 77-8, *supra*), if the Government's method of arbitrarily calculating the volume of the spot market on the basis of the estimate of one of its witnesses that independent refiners sell from one-third to one-half of their gasoline on the spot market is to be accepted, then the respondents' Mid-Continent purchases amounted to only from 14.9% to 22.7% of the total spot market and purchases from East Texas refiners took only 14.07% of that market.

[1]See pp. 57-58, *supra*, Def. Ex. 1024, p. 66, *supra*.

the cooperation of these journals; that the prices paid by the respondents had not led the spot market upward, but had followed and lagged behind whatever increases took place in the spot market prices; and that if the trade journals had reflected such prices, their quotations would have been substantially lower than they actually were.

On the face of it, there was a clear failure of proof. Nothing more had been shown than that the respondents had made concerted purchases of distress gasoline from independent refiners at prices at or below the lowest prices quoted in the trade journals as being paid by others in the market.

C. The theory of the case advanced by the prosecution after its failure to prove the original charge was a variance from the charge in the indictment.

To avoid the consequence of its failure to prove the original charge, the Government has now come forward with a completely new theory of the nature of the offense.

Since the respondents purchased gasoline which would otherwise probably have been sold on a distress basis, the Government contends that such purchases caused an increase in the general level of prices and that they therefore constituted the concerted action described in the indictment. It is claimed that the charge of falsification of the trade journal prices in a paragraph separate from those which purport to describe the "buying programs" indicates that such falsification was a separate auxiliary means of accomplishing the alleged conspiracy and not an essential feature of it (B. 142-4). This contention is diametrically opposed to the prosecution's own statement of what it conceived to be the charge in the indictment

before occasion arose to change its interpretation to fit the facts.

In their argument in opposition to the respondents' demurrers, and in their opening statement to the jury, Government counsel insisted that the conspiracy embraced a single scheme and that without the participation of the journals, the conspiracy could not have succeeded. Thus in opposing the respondents' demurrers, government counsel declared:

> "Now, here it is alleged that these trade journals knew anything that has been alleged in that indictment, and then intentionally participated in it. *Now, if knowing of that they had put their feet down and said, 'No, we won't cooperate,' they could have prevented this particular scheme from working.*" (R. 58. Italics added.)

And in their opening statement to the jury Government counsel said:

> "The prices, as I have said again and again, for all gasoline sold in this area, whether to jobbers or consumers, depend on the prices published in these journals. The journals ordinarily publish the going, open market prices. But during the time of this conspiracy, we will show that they published, not the going open market prices, but they published the prices that the major oil companies were trying to fix as the market prices for gasoline throughout this territory.
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> "The major oil companies sell their gasoline in these states. They sell 85% out of all the gasoline that is sold in these states. By buying on the open market small dribbles of gasoline, in relation to the large quantity that they sold here, and paying an arbitrary price, and getting the journals to carry

> that price as the going market price, that price automatically and directly became the price that they got for the great quantities of gasoline that they sold in this territory. *Now, that is the nub of the Government's case.*" (R. 105-6. Italics added.)

We are thus confronted with an indictment containing a material allegation of false publication of prices by the market journals coupled with the repeated assertions of Government counsel that such allegation was indispensable to the success or execution of the conspiracy charged.

The Government and the Circuit Court of Appeals suggest that the indictment states a complete accusation against the respondents even if the section charging falsification of trade journal prices be ignored. The Circuit Court of Appeals characterizes the trade journal allegations as "in the nature of an additional count specifically charging the trade journals" (R. 3937). The Government contends (B. 143) that since the trade journals are stated to have "aided" the other defendants, their participation is not described as an integral part of the conspiracy. These suggestions do not bear analysis. The fact that the trade journals did not actively participate in the alleged conspiracy would not of itself eliminate the possibility that their quotations were falsified by action of the conspirators without the journals' knowledge.[1] The respondents were not automatically relieved of the charge of falsifying the trade journal quotations when the trade journals were dismissed from the case. They still had the burden, which they sustained successfully, of show-

[1] Respondents' contention to the contrary was rejected by the trial court in its denial of their motion to dismiss at the close of the Government's case.

ing that they had not, without the knowledge of the trade journals, but by cooperation with the independent refiners who were constantly reporting their jobber prices to the journals and were one of their main sources of information,[2] secured publication of the prices they paid as the prices being paid by jobbers. That being so the function of paragraph 24 is not merely to charge the trade journals but also includes the description of the crime of which the other defendants were accused.

The Government also claims that the participation of the trade journals is "• • • alleged as a minor and subordinate means" (B. 142), and that it "• • • was not in any respect essential to the undertaking" (B. 144). Why, if the trade paper allegations are separate and non-essential as now suggested, did the Government say that without trade journal cooperation "this particular scheme" (using the singular) would not have worked? Why, if the trade journal allegations are "minor and subordinate" was the jury told that publication in the trade journal quotations of high prices paid by respondents was "the nub of the Government's case"? What justification can now be found for the draftsmen's repudiation of their own interpretation of the indictment, given before the taking of evidence had created the necessity of twisting it away from its true meaning if the prosecution was not to fail completely?

The question in this case is not whether it would be possible, by cutting out some of the allegations in this indictment and recombining others in different form, to construct a new presentment. It is, rather, whether *this* indictment as now drawn sets forth a plan which is a unified whole and

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[2] R. 745.

the described features of which are interdependent. If it does, then the fact that it contains elements which might be assembled into a different charge is immaterial.

The indictment does not make any vague general charge that the mere concerted purchasing of gasoline constituted the restraint. On the contrary, after describing the relationship between spot market prices, trade paper quotations and jobber contract prices, it groups under the heading "C. The Conspiracy", paragraphs 18-24 containing, first, a general allegation and then a more detailed description of the terms of the alleged agreement constituting the conspiracy,[3] to wit, the establishment of buying programs in which independent refiners were to be paid prices higher than the market price, which prices "paid by

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[3]Paragraph 18 standing alone is not a sufficient description of the alleged conspiracy to inform the accused of the nature of the accusation. Into that paragraph are thrown indiscriminately (a) a general allegation that the defendants "combined and conspired"; (b) an allegation of a general purpose for entering into the combination and conspiracy that there would result from it an artificial rise and fixing of prices in the spot tank car market; (c) a general allegation that the defendants had in fact carried out their combination and conspiracy and the desired prices in the spot tank car market had resulted; (d) that there had in fact followed further expected consequential results on the prices which jobbers, retailers and consumers paid to the defendants to the benefit of the defendants. This paragraph of the indictment, then, alleges no more than that the defendants entered into a conspiracy from certain motives and with certain results. It does not sufficiently disclose the *conspiracy agreement* itself or tell *what it was* that was agreed to be done by the defendants. The latter must be found in paragraphs 19-24. The fact that the material in these latter paragraphs is ostensibly a description of the "manner" and "means" by which the alleged conspiracy was effectuated is not controlling. Unless paragraphs 19-24, which are *all* equally under the heading "C. The Conspiracy," contain a description of the agreement constituting the conspiracy there is not a sufficient description of the conspiracy in the indictment and it is fatally defective.

the major oil companies as aforesaid" were, under the allegations of Paragraph 24, to affect the prices paid by jobbers, retailers and consumers in the Mid-Western area through the agency and instrumentality of the trade journals by the substitution of such higher prices in the trade journal quotations for the lower prices actually being paid by jobbers in the spot market. The whole indictment is instinct with the claim that it was the high prices paid by the respondents which were to lead to the payment of higher prices by jobbers, consumers and retailers in the Mid-Western area. And according to its specific language, it was the prices "paid by the major companies as aforesaid", not the prices paid by jobbers in the spot market, which "affected" the Mid-Western price level.[4] The indictment states specifically that the evil was to be accomplished by directly translating the major companies' supposedly high buying prices into the trade paper quotations, *not* by causing the *correct* quotation of spot market jobber prices to be enhanced in some other way. In this connection it is significant that while the Government in the presentation of its own case offered elaborate tables[5] in an attempt to show that the respondents paid prices higher than jobber prices and that these were printed as the trade journal quotations, it made no attempt to prove the quantity of the gasoline sold on the spot market,[6] the total production of even the independent refiners named as co-conspirators, or the percentage of the total independent refiner capacity owned by refiners so named.

When the pleader alleged that the trade publications have been "the chief agencies and instrumentalities

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[4]Indictment, paragraph 24, R. 16-7.
[5]Govt. Exs. 747-751, R. 883-900.
[6]See pp. 77-8, *supra*.

through which the wrongfully and artificially raised and fixed prices for gasoline paid by the major companies as aforesaid have affected the prices * * * in the Mid-Western area * * *",[7] he was charging that the falsification of the published market quotations was an integral and essential feature of the plan of action agreed on by the defendants as their conspiracy. It cannot now avail the Government to say to this Court, as it has (B. 143), that this allegation is surplusage. The claim fits in too exactly with the repeated declarations by Government counsel quoted above that the cooperation of the trade journals was a necessary element of "this particular scheme"[8] and that the falsification of the trade journal quotations constituted "the nub of the Government's case."[9] And this is especially so when it is noted that this language was deliberately added to the indictment. The inclusion of this language was no mere slip, but the deliberate and considered action of the prosecution in endeavoring to make clear the charge against the respondents.[10]

To summarize: this indictment was not brought as a charge that the defendants had been paying *too much* to small non-integrated refiners by not competing in their purchases from them. Paying those prices above the prevailing market was important to the pleader because of his further charge that the device of falsification of market quotations *translated* these higher purchase prices into

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[7]Indictment, paragraph 24, R. 16.

[8]Page 286, *supra*.

[9]Page 287, *supra*.

[10]See R. 59-60.

the published market price. As Government counsel recognized in the statements quoted above (p. 286), it is the only method for so doing that is set forth in the indictment.[11] The purchasing of gasoline and the falsification of the trade journal quotations are thus inextricably connected as necessary and complementary parts of a single scheme alleged in the indictment. Neither could be cut out of it without essentially changing the description of the plan and thus rewriting the indictment.

It follows that if mere proof of the conceded concerted action of the respondents in buying distress gasoline at or below what might from time to time be the lowest price made in sales by independent refiners to jobbers establishes any offense whatever, that offense is a very different one from that charged in paragraphs 19 through 24 of the indictment. Not only is it lacking in the essential element of interference with trade paper quotations, but the feature of payment of uniform prices above the market which might of itself be contended to have some adverse effect on competition is also missing.

The arch of the original accusation fell to the ground when these two stones were removed. The reconstruction attempted by the Government in laborious interpretations of the charge which contradict their earlier views of the case created an entirely new and different structure not only substantially varying from the original but, except in isolated parts, hardly bearing any recognizable resemblance to it.

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[11]To spell out anything more, it is necessary to resort to arguments that the indictment *implies* a charge different from that which it specifically describes.

D. The variance is prejudicial and a verdict should have been directed in favor of respondents.

The existence of a variance cannot be doubted. Its prejudicial and fatal character is equally clear.

A fair statement of the Government's whole attitude in this case is found in its comment on the effect of the variance which resulted from the failure to prove falsification of trade journal quotations. The Government says:

> "They [the respondents] were not surprised by the alleged variance because they themselves introduced the evidence to disprove the charge that the trade journals published[1] the defendant companies' prices" (B. 146).

A more amazing misconception of the rule against variance between pleading and proof would be hard to conceive. That rule depends upon the fundamental principle that an accused is entitled to be advised in advance of the charge which he is to meet.[2] Its purpose is to protect

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[1]The brief reads "did not publish" but "published" seems to have been intended.

[2]*Meyers* v. *United States*, 3 F. (2d) 379, 380 (C. C. A. 2d, 1924); *United States* v. *Byers, et al.*, 73 F. (2d) 419, 422 (C. C. A. 2d, 1934); *Kutler* v. *United States*, 79 F. (2d) 440, 442 (C. C. A. 3rd, 1934); *Malaga* v. *United States*, 57 F. (2d) 822, 825 (C. C. A. 1st, 1932).

Berger v. *United States*, 295 U. S. 78, 83 (1935), relied on by the Government, is not contrary. In that case the indictment charged a conspiracy to utter false Federal Reserve notes but did not state the purpose of the uttering. The evidence disclosed that some of the defendants uttered for one purpose, and some defendants for another purpose. This Court held, in substance, that as long as defendant was shown to have committed the offense as charged, he was not prejudiced because his associates were shown to have been involved in a different conspiracy. *In other words, as to him the evidence established the very conspiracy charged.* That obviously is not the case this Court is now called upon to consider, for here there exists a very definite failure of proof of the conspiracy as charged and described.

him, not against surprise resulting from failure of the Government to prove its case (such surprise could never be prejudicial), but against surprise resulting from his being called upon at the trial to meet a new charge of which he has had no previous warning. The reasoning of the Government amounts to saying: "If you prove yourself not guilty of the charge we make in the indictment, then it is perfectly fair to charge you with something entirely different. Since you knew all the time that we couldn't prove the original charge, therefore you must have known that we meant not that charge but this other charge which we have just disclosed to the jury for the first time after all the evidence is in." If the Government is right, there is no such thing as a prejudicial variance between pleading and proof, and the accused who is in a position to refute a specific accusation against him must be ready to guess at his peril what other charges the prosecution may make against him and refute such other charges also.[3] Such, we submit, is not the law.

Not only did the variance here deprive respondents of an opportunity to offer evidence on a charge of which they were given no notice, but the complete switch from the earlier charge of restraint by falsification of trade journal published quotations threw the whole course of the trial

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[3]The negligence case cited by the Government, *Washington and Georgetown Railroad Company* v. *Hickey*, 166 U. S. 521, has no bearing on the question. Where a defendant accused of causing negligent injury in one way comes into court and affirmatively proves that he caused the injury in a slightly different way, there is, of course no prejudicial variance. That is far from a holding that disproof that the injury was caused in the manner described in the pleadings justifies an attempt by the plaintiff to then charge that the injury was done in an entirely different way.

into disorder. The restraint alleged in the indictment would have been unreasonable and, therefore, unlawful on its face. The history and conditions of the industry, the objectives of the Government in the rehabilitation of the industry, the circumstances which led up to and the effects of the respondents' concerted buying, would not have availed to make any such transaction reasonable and lawful. As a result, all through the case the trial court, as the record discloses, was constantly torn between making a strict ruling excluding such evidence as immaterial and a grudging and disjointed admission of it in the course of the efforts which the respondents were making to put the full story of all that they had done and the circumstances in which it was done before the jury. The respondents were substantially prejudiced by this situation which prevented the jury from ever getting a clear picture of their position and necessarily led them to believe that an attempt was being made to befog the issue by the introduction of irrelevant evidence.

Even more prejudicial was another result of the variances. The respondents, in order to meet and disprove the charge made in the indictment of falsification of the trade journal quotations and of the payment of higher than going market prices, were forced to go into enormous detail in analyzing and proving the actual prices which they had paid in every purchase made from an independent refiner throughout this period. They were also forced to make a protracted and detailed audit and examination of all the sales of more than a score of independent refiners to all their jobber customers during the indictment period. Necessarily, the results of this examination had to be presented to the jury and explained

in detail,[4] a process which took days of the court's time. All this evidence[5] became confusing and burdensome to the jury when the case was submitted to them under the instruction of the court that it was immaterial whether the prices paid by the respondents to independent refiners were higher or lower than prices paid by jobbers. Inevitably the impression was created that the volumnious testimony and exhibits in regard to prices which had been presented with such elaboration and detail *to refute the specific charge of the indictment* were totally irrelevant and had been brought into the case solely for the purpose of confusing the issues and misleading the jury.[6]

Another source of injury from the variances will be respondents' position in any treble damage suits. If this

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[4]Def. Ex. 1024, R. 3807; J. D. Miller, R. 1539-1617, 1649-1678. See also Def. Exs. 712, 713, 716, 741, 857, 858, 868-73, 889, 890, 984, 998-1003.

[5]Showing conclusively that the defendants had purchased at or below the lowest published market quotations and that there had been no false publication in the market journals.

[6]This is no illusory, after-the-fact, argument. Counsel for the Government repeatedly characterized defendants' proof of the accuracy of the trade journal quotations and the lowness of the prices they paid to independent refiners as "a red herring drawn across the trail." A typical example of the advantage taken by the Government on account of the permitted variance is the following statement by Mr. Lewin in summation:

> "And it makes not one iota of difference—*it is a mere attempt at confusion*—to bring in here day after day a smart accountant, who aided by fifteen others, working night and day, put little dots and dashes along these charts, hung up flag after flag here." (Italics added.) (R. p. 2062.)

The charts thus referred to were Defendants' Exhibit 1024, which shows beyond contradiction that contrary to the indictment the trade papers were not falsified and that the prices paid by respondents were neither high nor uniform, and similar charts comparing the prices paid by the respondents with the trade paper quotations.

conviction should stand, the respondents will be further prejudiced in the defense of any such suits since the verdict will be *prima facie* evidence of the conspiracy *as alleged* in the indictment. Respondents will, therefore, again have the burden of disproving the inflammatory charges of falsification of trade publications. In doing so, they may very well be confronted with a claim that the jury is entitled to take the verdict as proof of the indictment in preference to the evidence of disproof then offered.[7]

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[7]The injury resulting to these respondents from the variances between the allegations of the indictment and the proof can be illustrated by the case of *Local 167* v. *United States*, 291 U. S. 293 (1934). The defendants in that case had been previously convicted under an indictment charging a violation of Section 1 of the Sherman Act. The indictment had described the precise means used by the alleged conspirators. Subsequent to the conviction, and while an appeal from the criminal conviction was pending on appeal in the Circuit Court of Appeals for the Second Circuit, the Government instituted an action in equity to enjoin the practices described in the indictment. The petition in equity was substantially identical with the conspiracy indictment. The defendants answered it by denying that they had formed the conspiracy alleged. The lower court struck the answer as frivolous and sham on the ground that the judgment of conviction was conclusive as between the parties, and that the defendants *were estopped to deny* that they had done the specific things described in the indictment. This action of the trial court was upheld by this Court, which stated:

> "The judgment in the criminal case conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. * * *" (291 U. S. at 298.)

This doctrine is particularly important in a Sherman Law case. Section 5 of the Clayton Act provides:

> "A final judgment or decree hereinafter rendered in any criminal prosecution or in any suit or proceeding in equity

Finally it is no light thing for the respondents to rest under the stigma of a conviction of a charge of the grossest fraud on their customers and on the public in the falsification of published market quotations when, as a matter of fact, this charge was affirmatively disproved and forced to be abandoned on the trial.

In short, by permitting the variance complained of, the trial court without justification placed these respondents in an impossible position, from the standpoint of the defense of the case pending against them, from the standpoint of actions against them in the future and from the standpoint of pleading double jeopardy in another prosecution for the same offense.

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brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: * * *"

In an action instituted for damages under this section the plaintiff could describe the alleged conspiracy in the exact words of the indictment, and urge that the judgment of conviction was *prima facie* proof as against the respondents that they had done the precise things alleged in the indictment. The burden of overcoming this presumption raised by a conviction would be both expensive and hazardous before a jury.

VII.

THE CIRCUIT COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT THE RESPONDENTS WERE NOT ENTITLED TO DIRECTED VERDICTS OF ACQUITTAL.[1]

The respondents contend that this record contains no substantial competent evidence that the combination, either in purpose or effect, unreasonably restrained trade within the meaning of the cases herein cited.

The brief of the Government attempts to dismiss this contention by the statement that:

> "• • • in the court below respondents did not even attempt to lay the necessary foundation for this contention, namely, that there was no evidence adequate to support findings by the jury that their combination had the purpose and the power to raise and fix prices" (B. 147).

In this the Government is in error. In their brief below the respondents centered their argument on this point on an examination of the record to show that there was no evidence to warrant a finding by the jury:

(1) That the purpose and effect of the respondents' concerted action was to *do more* than free the play of competition in the spot market from the distorting effect of distress sales at forced prices;

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[1]This point was raised in the Circuit Court of Appeals by Assignments of Error Nos. 1-16, inclusive (R. 2515-7). The Circuit Court of Appeals decided it adversely to the respondents (R. 3938-9). It is the third question presented by the respondents' cross-petition in No. 347 (p. 2).

(2) That the respondents had the power to affect price in any other way.

It was our contention there, as it has been here, that, unless there was substantial evidence to warrant such conclusions, there was not sufficient evidence to go to the jury on which they could find an undue restraint of competition. It was our contention there as here that the evidence was without conflict and affirmatively established the contention of the respondents on these issues of fact.

The Government in its argument on this point has not undertaken to point out evidence which would support sending the case to the jury on these issues. The pertinent facts are summarized in the following argument. For a complete digest of the facts we respectfully refer the court to respondents' Appendix A filed herewith.

A. The law applicable to an appeal from the denial of a defendant's motion for a directed verdict.

All courts agree that it is the duty of an appellate court to reverse a judgment of conviction where all of the substantial evidence is "as consistent with innocence as with guilt." As the Circuit Court of Appeals for the Eighth Circuit said in *Union Pacific Coal Company* v. *United States*, 173 Fed. 737 (1909) (opinion by Judge Sanborn, concurred in by Judge, later Mr. Justice Van Devanter):

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which

exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." (173 Fed. at 740.)[1]

B. The issue here under the Sherman Law.

As we have shown in Point I, this Court has developed certain tests to be applied to a state of facts such as that presented by this record—*i. e.*, for determining whether

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[1]This rule has been followed in every circuit (including the Seventh Circuit) which has passed upon the problem. *Grant* v. *United States*, 49 F. (2d) 118 (C. C. A. 3rd, 1931); *Graceffo* v. *United States*, 46 F. (2d) 852 (C. C. A. 3rd, 1931); *Nicola* v. *United States*, 72 F. (2d) 780 (C. C. A. 3rd, 1934); *Paul* v. *United States*, 79 F. (2d) 561 (C. C. A. 3rd, 1935); *Gerard* v. *United States*, 61 F. (2d) 872, 875 (C. C. A. 7th, 1932); *Isbell* v. *United States*, 227 Fed. 788 (C. C. A. 8th, 1915); *Hays* v. *United States*, 231 Fed. 106 (C. C. A. 8th, 1916); *Read* v. *United States*, 42 F. (2d) 636 (C. C. A. 8th, 1930); *Danaher* v. *United States*, 39 F. (2d) 325 (C. C. A. 8th, 1930); *Salinger* v. *United States*, 23 F. (2d) 48 (C. C. A. 8th, 1927); *Tinsley* v. *United States*, 43 F. (2d) 890 (C. C. A. 8th, 1930); *Rosenthal* v. *United States*, 45 F. (2d) 100 (C. C. A. 8th, 1930); *Gargotta* v. *United States*, 77 F. (2d) 977 (C. C. A. 8th, 1935); *Vernon* v. *United States*, 146 Fed. 121 (C. C. A. 8th, 1906); *Cady* v. *United States*, 293 Fed. 829 (Ct. of App., D. C., 1923); *Moore* v. *United States*, 56 F. (2d) 794 (C. C. A. 10th, 1932); *Parnell* v. *United States*, 64 F. (2d) 324 (C. C. A. 10th, 1932); *McClintock* v. *United States*, 60 F. (2d) 839 (C. C. A. 10th, 1932); *Leslie* v. *United States*, 43 F. (2d) 288 (C. C. A. 10th, 1930). It is also the rule which this Court has laid down (although no criminal cases have been found) in all cases which have come before it. *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333 (1932); *Gunning* v. *Cooley*, 281 U. S. 90 (1929); *Stevens* v. *The White City*, 285 U. S. 195 (1931); *Chicago, Milwaukee and St. Paul Railway Co.* v. *Coogan, Spec. Adx.*, 271 U. S. 472 (1925); *New York Central Railroad Company* v. *Ambrose, Adr.*, 280 U. S. 486 (1929).

in purpose and effect the activities of a combination impose an undue or a reasonable restraint on competition.[2]

(1) Forced sales of a distress product which contribute substantially to the depressed condition of an industry may constitute a competitive evil.

(2) An intention "to stabilize the business, or to produce fairer price levels", through the elimination from a competitive market of a competitive evil (such as distress gasoline) is not unlawful.

(3) Concerted effort to correct such competitive abuse is promotive of sound competition and not condemned by the law unless by reason of its intent, inherent nature or effect it goes beyond what is necessary to correct the abuse, and instead of merely freeing competition from the effect of that abuse unreasonably restrains it in some other manner.

In a word: Unless this record contains substantial evidence (as defined above) on which a jury could find that the concerted action of the respondents in purpose or effect went beyond the mere freeing of competition from the distorting effect of a competitive abuse and imposed some other restraint undue in character, the respondents were entitled to directed verdicts.

C. The respondents' purpose was lawful.

1. *There is no conflict in the evidence that there was a competitive abuse.*

The record shows that for several years prior to the indictment period the distress of the oil industry was so

[2]See pp. 148-63, *supra*.

acute as to call for remedial cooperative action.[1] It also shows that this condition was recognized not only by the industry but by the state and federal governments.[2]

There was no dispute as to these facts. The Circuit Court summarized them as follows:

> "* * * It is plainly apparent that for several years prior to the alleged conspiracy, the gravest problem confronting the oil industry was the overproduction of crude oil, which inevitably resulted in an over-supply of gasoline. This meant a decline in prices often below the cost of production. As new fields were developed the problem became more acute. Both State and Federal Governments actively engaged themselves in attempting to remedy and solve the problems in various ways, such as curtailment of production, buying programs, and the fixing of prices at which crude oil could be sold. * * *
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> "Beginning in March, 1933, the Federal Government, the interested states and the industry joined in a general movement to eliminate such destructive practices and to restore healthy competitive conditions. The record sustains appellants' statement that it was sought to accomplish three principal objectives:
>
> "(1) The restoration of the price of crude oil to a minimum of $1.00 per barrel. That was the minimum price at which the vast majority of the crude oil wells of the country could operate.
>
> "(2) The restoration of the price level of gasoline at wholesale at the refinery to 'parity' with crude oil; that is, a price which would reflect the normal relation between the price of gaso-

[1] Pp. 16, *et seq., supra.*
[2] Pp. 20, *et seq., supra.*

line and the price of crude oil from which it is manufactured.

"(3) The stabilization of the retail prices at a normal spread or margin between the refinery price of gasoline and the retail price" (R. 3917).

The Government does not contend that it introduced any evidence to controvert these facts. It thus appears, from undisputed facts that in the winter of 1935 there was a situation in the industry, particularly in the gasoline tank car market, calling for remedial efforts. The cases we have cited show that a purpose to relieve such a depressed industry is lawful.

The situation just described was caused primarily by two abnormal and destructive competitive evils. One of them was "hot oil"—that is, oil produced in violation of the state proration laws.[3] The other was "distress" gasoline in the hands of non-integrated refiners.[4] The activities of the respondents were directed at the latter.

The Circuit Court summarized the facts contained in the record as follows:

"• • • If there is any one thing completely established, it is that the oil industry, as well as numerous Governmental agencies, Federal and State, have recognized surplus crude oil and surplus gasoline as a distress product, the elimination of which was not only desirable, but necessary if the industry was to survive, to say nothing of prospering. This situation alone cannot be relied upon as a defense, but it affords justification for the action of the defendants in treating surplus gasoline as an evil of

[3]Shatford, R. 1000-1; see pp. 19-28, *supra*.
[4]Frey, redirect, R. 1327; see pp. 29-31, 103-12, *supra*.

> the industry and in making a concerted effort to eliminate the same with a view of stabilizing the market, even though an increase in price might result; provided, of course, the program, either as planned or executed, did not go so far as to constitute an unreasonable restraint by unduly suppressing or interfering with fair competition. * * *" (R. 3929-30).

The Government does not show any conflict of evidence in this matter. It merely states its view that the industry and the Secretary of the Interior were wrong in believing that the effect of forced sales by small refiners was a competitive evil. It takes the position here, as it did in the *Appalachian* case, that buyers ought always to be in a position to take full advantage of inequality in bargaining power and that any mitigation of that situation is an undue restraint on competition. That, however, was not the conception of this Court in the *Appalachian* case. The facts are discussed at length on pages 103-112, *supra*. We submit that they show no evidence that distress gasoline was not a competitive evil.

On the contrary, (to quote the Circuit Court of Appeals), its existence as a competitive evil was "completely established".

2. *There is no conflict in the evidence that the concerted action was directed at the elimination of this abuse. Its purpose did not become unlawful because the elimination of the abuse would tend to "stabilize prices and produce fairer price levels."*

Faced with these conditions, taking the evidence most strongly against them, what did the respondents do? The

Circuit Court of Appeals found that the facts were "not in dispute".

> "• • • Without going into detail • • • we think the substance of what was accomplished and agreed upon was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices" (R. 3919).

The Government does not dispute that if there was such a thing as distress gasoline the respondents' purpose was to eliminate it. It urges, however, that they had another purpose which is controlling in this case; namely, a purpose to increase the price of gasoline.[5] Let us analyze this contention. Of course, distress gasoline, like any other competitive evil, tended to depress the price. Obviously, the removal of distress gasoline would permit the price to rise to the extent that the evil had abnormally depressed it. It is *only in this sense* that the record discloses any purpose or intention on the part of these respondents to increase the price of gasoline. If such a purpose were unlawful, the law would condemn every cooperative effort to eliminate competitive evils, for all such efforts tend to "stabilize prices and produce fair price levels."

The cases which we have discussed under Point I above show that this Court does not deem unlawful a combination which stabilizes or raises prices solely by the removal of a competitive abuse. As this Court said in both the *Appalachian* and *Sugar Institute* cases:

> "The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price

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[5]See B. 18, 26, 28, 31.

levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. * * *" (288 U. S. at 373-4. See also 297 U. S. at 598.)

D. There was nothing in the nature or effect of the method used to remove the abuse which made the plan an undue restraint.

We have shown that the purpose for which the respondents combined was lawful. Now, in accordance with the second part of the rule described in Section B above, we must examine the further question: Did the combination, by reason of its nature and effect, unduly and unreasonably restrain trade?

In the *Appalachian Coals* case, this Court indicated that the primary test of reasonableness is whether the combination would "effect a change * * * which would be in mitigation of recognized evils" and whether the restraint imposed was incidental to the attainment of this lawful purpose (288 U. S. at 374). In the *Sugar Institute* case, on the other hand, this Court indicated that even a combination to accomplish a lawful purpose might be unlawful if the parties went "further than was reasonably necessary to accomplish their professed aims." (297 U. S. at p. 578.) The primary test, therefore, for determining whether the means used by the respondents were lawful must be: Did they go beyond what was necessary to eliminate the competitive evil of distress gasoline, and restrain trade in some other or different manner?

1. *The method used was an appropriate one to deal with the abuse.*

As we have seen, "the substance of what was accomplished and agreed upon was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices" (R. 3919). What were the mechanics used to make this program effective? The Circuit Court described them as follows:

> "• • • Defendant Bourque was designated to make surveys with a view of ascertaining the amount of surplus gasoline and furnishing such information to the defendant companies. A mechanical sub-committee consisting of one Jacobi, the appellant McDowell, and the defendant Tuttle, was appointed to assist in the disposal of surplus gasoline not anticipated by the monthly surveys. It was also a part of the function of this sub-committee to urge companies to pay the fair going market price. • • •
>
> "• • • The Tank-Car Stabilization Committee held monthly meetings at which the surveys with reference to surplus gasoline were considered. There is evidence to the effect that the committee recommended the amount which each company should purchase and that the companies felt a moral obligation to comply therewith. The Mechanical Sub-Committee also met frequently and was in frequent contact with the purchasing companies, oftentimes urging them to increase the amount of their purchases. The defendant companies reported monthly to Bourque the volume of purchases and the prices paid in connection therewith. Although there is evidence that the defendants in some instances purchased more gasoline than they actually required, it was all disposed of in the usual channels of trade.

> • • • The Tank-Car Stabilization Committee was concerned with the price at which purchases were to be made, but it seems the Committee was chiefly interested with prices not below the going market price. In fact, no purchases were made above that price and prices actually paid to the independent refiners varied considerably" (R. 3919-20).

Such a program was clearly appropriate to eliminate the competitive evil of distress gasoline.

The first thing to do was to find out how much of this product there was which would be "distress." Some of the small refiners would have none. The situation of others would vary. Bourque's current surveys of distress gasoline and the activities of the Mechanical Sub-committee constituted a necessary and sensible first step.

Obviously, the next thing required was to find outlets which could take the distress gasoline from the small concerns which had it *at the time* when they would be otherwise forced to dump it. The major companies were the normal outlets. The Government itself had recognized this in sponsoring its buying programs in 1934.[1]

There was another feature which was absolutely essential if this plan were to work fairly and usefully. After the small concerns had disclosed the extent of their weakness and the urgency of their needs through Bourque's survey; it would have been manifestly unfair for a large concern to take advantage of that knowledge by buying at the lowest distress price which the small refiners' distressed situation might necessitate. Indeed, so far

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[1]Arnott, R. 1702, redirect, R. 1799-1800; see Shatford offer, R. 1048-51; Deft. Exs. 844-847 for Identification, R. 3367-86; Appendix A, pp. 50-55.

as the independent refiners were concerned, such action would not have mitigated the competitive evil. Any plan for relieving the abuse of distress sales therefore required that the large concerns should buy at, or not substantially lower than, the prevailing market prices[2] at which the small refiners and their jobber customers were, respectively, selling and buying. As appears from the record, this was a feature of the plan of the Tank-Car Stabilization Committee.[2] It would be an essential part of any reasonable plan.

It is to be noted that *the very price paid was thus made dependent upon the market price which was made by competition in sales by the independent refiners to independent jobbers and consumers on the spot tank-car market.* It would thus merely bring the price they were paying for distress products more nearly in line with whatever competitive price was arrived at in the sales on the spot tank-car market. Insofar as the price was based upon the competitive market, the agreement is analogous to that involved in the *Chicago Board of Trade* case, in which there was an agreed price on products sold between trading hours and that agreed price was made to depend on other sales on the market, namely, those made at the close of the trading hours.

The test is not whether there was *some* concerted action about price as to *some* portion of a product. The question is whether there was a wiping out of competition in the spot tank-car market which prevented the prices *in that market* from being made by the play of competition in sales be-

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[2]McDowell, R. 1183, 1184, 1188, 1194, 1199; Sus, cross, R. 1870.

tween independent refiners and their jobbers and consumer customers.

These were the fundamentals of the scheme. They furnished what was on its face a fair and sensible method of dealing with the abuse. This brings us to the question of whether there was evidence that the nature and effect of this method adopted to deal with the competitive abuse, though appropriate for that purpose, was nevertheless such, that instead of merely freeing competition from the distorting effects of the abuse, it imposed other and undue restraints.

2. *There is no conflict in the evidence that the spot market price continued to be determined by the play of competition.*

After the plan was in effect, as before, independent refiners bargained on the spot market with independent jobbers and consumers who were accustomed to buying on that market. The range of prices arrived at in this bargaining made the market which was published in the journals.[3] That market price was certainly a price determined by the play of competition. Before the buying began, however, it was affected by sales of "distress gasoline" and "hot oil", which were sold below that competitive level and tended to pull that level down and hold it down.

When "hot oil" and "distress gasoline" were eliminated, the spot tank-car market price continued to be arrived at in the same way by buying and selling between jobbers and independent refiners. But the depressing fac-

[3]Steiger, R. 745-8.

tors of sales of "hot oil" and "distress gasoline" below the going market were now removed.

A careful analysis was made of a multitude of sales by independent refiners to jobber customers during this period.[4] *It shows conclusively that they were selling to their customers at diverse prices instead of at uniform prices.* Indeed, as the evidence shows, they frequently made sales below the low of the market quotations and, frequently, above the high of these quotations. From all the sales trade papers gathered the prevailing range of the market, and reported it.[5]

There was a suggestion, by the Government in its summing up and in its petition for writ of certiorari, that the prices at which the independent refiners sold were prices which they agreed with the respondents to name. That contention, and the reference to testimony cited in the petition for certiorari to support it, have alike been dropped in the Government's brief. We will not discuss it, except to point out that not only is there no evidence to support such a claim, either in the testimony or in the contemporaneous memoranda of what took place at meetings of the respondents, but it is negatived by the analysis of the sales of independent refiners to jobbers which we have just referred to.[6] (Defendants' Exhibit 1024.) The Circuit Court of Appeals, after reciting the circumstances,

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[4]Def. Ex. 1024, p. 66, *supra*.

[5]Steiger, R. 745-8.

[6]Any contention based upon a claim that there was such evidence would immediately establish a fatal variance, because there was no such charge of any agreement in the indictment. The only agreement as to prices charged in the indictment was as to the buying prices at which the respondents agreed among themselves that they would buy from the independent refiners.

said: " • • • under such circumstances it cannot be held that competition on the 'spot' market was eliminated" (R. 3932).

We come next to the question of whether the buying had any effect on this competition other than that flowing from the removal of the distorting effect of the abuse.

3. *There was no evidence that the buying of distress gasoline at going prices had any effect on the competitive market price beyond that flowing from the removal of the evil.*

Of course, as this Court recognized in the *Appalachian Coals* case, you cannot remove a competitive evil which is artificially depressing the price, without thereby assisting the price to return to a normally competitive level.[7] To show that the buying did more than this, the Government relies primarily on (1) the fact that prices did rise; and (2) the fact that after the rise there followed an unprecedented stabilization of price level. (B. 20-21, 30, *et seq.*)

(a) The price rise.

The evidence showed a recovery in the price level of refined gasoline from a low quotation of 3¼¢ for third-grade in February (a cent or more below the cost of production) to 4¾¢ in June.[8] In their closings, Government counsel admitted that there were other factors than buying, such as the elimination of "hot oil" by the Connally

[7] 8 U. S. at 373-4.

[8] There is no conflict in the evidence that a further rise of ½¢ in January 1936 was due to, and in parity with, a rise in the price of crude oil. (Jacobi, R. 4878.)

Act, which contributed to this rise. No witness assumed to testify, and none could honestly assume to testify, as to how much of a factor the buying of the respondents had been in this rise.

Would the level to which the price rose warrant a jury's inferring that the buying program's contribution to the rise in price had any effect beyond what occurred in the *Appalachian Coals* case from the elimination of distress sales of coal? Certainly not. The price merely recovered to a level described by the Government and industry as "parity with crude"—the natural price relationship between the finished product and the cost of its raw material.[9]

There is the conclusive admission of the report of the Secretary of the Interior on this point, and there is no conflicting evidence. Let us quote here once more precisely what the Government, through its officer in charge of the administration of the oil industry, said about this matter:

> "The operations of the Tender Board, of the production provisions of the code and refinery amendment, and of the stabilization committee of the planning and coordination committee with the cooperation of the Petroleum Administrative Board, brought the desired parity between the wholesale price of gasoline and crude oil in the spring of 1935. * * *" (R. 3525).

The point here is not whether this price level was a "reasonable" one. The point is that it was a natural one,—a level in relationship to crude which experience

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[9]McDowell, R. 1181; see Def. Ex. 710 for identification, R. 3141, 3149-50.

had shown was arrived at from the play of normally competitive forces *in the absence of artificially depressing factors such as hot oil and distress gasoline.* That no doubt was the reason why the Secretary of the Interior described it as the "desired parity."[10]

There is nothing then in the circumstance of this rise in price which constitutes evidence which would warrant a jury in finding that the buying activities had had any other effect on the competitive price level than the removal of the distorting effect of the abuse. If it is consistent at all with any conclusion, and we do not believe it is, it is at least equally consistent with a contrary finding.[11]

(b) Stabilization of price.

The Government next relies on the stabilization of the price after the rise in the spring of 1935. (B. 20-21, 30, *et seq.*). Does the circumstance of that stabilization war-

[10]The Government, in the endeavor to escape from the effect of this admission, refers to a letter (Ex. 306, R. 2957) which indicates that the parity level would yield what the head of one of the manufacturing divisions of one of the respondent corporations regarded as something more than a "quite substantial profit." Since the same letter shows that the company had previously been manufacturing at 1¢ per gallon loss, a parity level which would yield "quite a substantial profit" does not indicate any abnormal price. Even if the statement in this letter was accurate, the manufacturing costs of White Eagle, a major company, were obviously very low compared to those of independent refiners. The evidence is uncontradicted that the level to which prices rose was hardly at the "break-even" point of most independent refiners (R. 935). Further, the point here is not what profits any individual company may have made, but whether the price level was a naturally competitive one. Certainly everyone in a business does not have to operate at a loss in order for the price level to be a normally competitive one.

[11]For a full review of the evidence as to the price rise, see *supra*, pp. 65-82 and Appendix A, pp. 242-59.

rant the inference that the concerted action of the respondents did more than free competition from the depressing effect of distress sales? It would seem not.

(1) The level at which prices stabilized themselves was parity—the natural level in relationship to the price of the raw material under normally competitive conditions.[12]

(2) During the period there were no changes in cost of production except a rise in the price of crude oil in January, 1936, to which the price of gasoline responded in a normal way.[13]

(3) *For the first time in our economic history an attempt was made to balance the supply in a competitive industry with demand, with the whole force of Government, state and nation behind it.* The prime causes of violent fluctuations from time immemorial in the industry, such as overproduction in new flush fields, resulting overproduction by wells and refineries, illegal production of crude with the resulting varying hot oil factor, were thus eliminated. Supply and demand were brought into reasonable continuing balance (See Appendix A, pp. 247-52). From these factors stable price was to be expected.

Under these circumstances was there anything to warrant a jury's inferring that the respondents' activities made themselves felt in this stabilization of the price level in any way other than by helping eliminate the sudden capricious fluctuations in the market which arose from the

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[12]See p. 314, n. 9, *supra*.

[13]Jacobi, cross, R. 487-8; Van Covern, R. 1514.

forced dumping of gasoline? It is just this kind of abnormal fluctuation, where there is no basic reason for a change, that makes the sale of distress gasoline at distress prices a peculiarly destructive competitive practice. While the situation injures everyone in the industry, it bears most heavily on the weak. It injures the small refiners *as a class* because, if prices temporarily go down because of such fluctuations, they have to bear the full brunt of the difficulties. They are not able through lack of storage to carry their product over until the market reacts to a normal level.[14]

It is conditions of this character which make it desirable to take concerted action to mitigate destructive practices, as was done here and in the *Appalachian Coals* case.

If the buying activities of the respondents had had any other effect on competition, then we would have expected prices to rise above the natural level of parity to an artificial level. They never did.

This circumstantial evidence as to the stability of price at parity levels, if it is consistent at all with the inference that the respondents' buying constituted an undue restraint on competition, is equally, and as we think only, consistent with the inference that the buying activity merely freed competition from the depressing effect of the competitive abuse.[15]

(c) Effect of purchases as limiting supply.

The Government next argues (B. 44, 47, 80) that the respondents' purchases so narrowed the supply available

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[14]See pp. 29, 106, *supra.*

[15]For further statement as to the evidence as to the conditions producing stabilization during this period See Appendix A, pp. 242-59.

on the spot market that they had an effect on competition beyond that which would flow from purchases made merely to cure the competitive abuse of distress sales. As to this, in referring to the play of competition in the determination of the market price on the spot market, the Circuit Court of Appeals said: "* * * there remained, theoretically, at least, and *factually so far as the record discloses, a supply equal to the demand.*" (Italics supplied.) As has been developed (*supra*, pp. 78-80), the Government did not show that the purchases of the respondents in inter-refinery buying materially exceeded, or exceeded at all, those which had been made either in previous or following years, or that there was any difficulty on the part of the jobbing trade in securing the products it desired.

The record shows that even the so-called brokers, who bought speculatively for their own account in the market for resale, bought regularly and heavily.[16]

The essence of the plan, as the testimony shows, *supra*, pp. 38 *et seq.*, was not to increase greatly the major's purchases but to so direct them to a *particular refinery* and at a *particular time* that products would flow normally in trade instead of being dumped in forced sales by a small refiner who could not carry the stocks and could not at the moment find a jobber customer who in turn had a need for the product in his regular trade.

Speculators, whose business it was to take advantage of such hard situations might, of course, be adversely affected, just as the speculative buyers of distress coal at distress prices in the *Appalachian Coals* case undoubtedly were.

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[16]The facts as to witness Beroth are examined at length in Appendix A, p. 224.

There was, therefore, no direct evidence of engrossment of the market and the circumstantial evidence, instead of pointing to it, points the other way. If there had been an artificial narrowing of the independent refiners' market among jobbers, so that there was an effect on price other than that of relieving the pressure of distress sales, we would have expected the price to rise to artificial levels. Instead, there is no conflict that all it did was to return from a cent or more below cost of production to parity—its natural level under normally competitive conditions.[17]

The evidence on this point, which was circumstantial in character, if consistent at all with the Government's contention—which we deny—was at least equally consistent with innocence and, therefore, could afford no basis for an adverse inference by the jury.

(d) Alleged purchase of all gasoline that the independent refiners desired to sell.

The Government argues (B. 44, 80) that the agreement was to take any gasoline which an independent refiner might offer at the market price. The contemporaneous records of the respondents' discussions and testimony as to what actually occurred are all devoid of evidence to this effect. As the Circuit Court of Appeals stated it, the agreement referred solely to the purchase of *distress* gasoline. (R. 3919.) There is no evidence that the committee, which made monthly surveys showing the amount and location of distress gasoline, was either misled as to the factual situation or intended to disregard it.[18]

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[17]See p. 314, n. 9, *supra.*

[18]See *supra,* pp. 44-59 and Appendix A, pp. 110-30.

It is very clear that the independent refiners had no such conception of the matter. Defendants' Exhibit 1024 shows that many of them constantly made some of their sales to jobbers at below the low of the trade publication quotations.[19] Various Government witnesses testified that they were frequently able to buy from independent refiners at below the low of the market quotations.[20]

Here again, the proof of the nature of the agreement is shown by what was actually done. There was no inherent tendency to push the price up to non-competitive levels from the fact that the respondents were buying distress gasoline at about the going market price. If there had been, instead of stabilizing itself at the natural competitive level of parity—which it did—we would have expected the price to keep on to artificial heights. The respondents were buying in precisely the same way during the period when prices had levelled off as they were before; and yet, while particularly disturbing situations in the market led to a temporary drop below parity at different times, the price never went above it.[21]

Nor can it be argued, as the Government seems to imply, that this was due to the fact that there were no new recommendations as to price made during this period. The fact was that the the only occasions on which any recommendation was made were *after* the market price had risen. The recommendation merely reflected what *had already* taken place in the market.[22] There being no further rise in the market price after parity had been reached

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[19]P. 66, *supra*.

[20]See *e.g.*, Beroth, R. 191-2, 196-7; Lanzer, R. 247, 250; Peterson, cross, R. 300-3; Bradshaw, R. 685.

[21]Def. Ex. 1024, p. 66, *supra*.

[22]See p. 52, *supra*.

except the normal adjustment to meet the rise in the price of crude, there was no occasion to make any further recommendation. The buying price of the respondents continued to range at about the low of the market. If buying in that way inherently tended to force prices up to artificial levels we would have expected to see them keep on rising to above parity. They did not.[23]

Here again, if an inference is to be drawn from the circumstances, it is that the plan of buying distress gasoline at about the going market price had no inherent tendency or inherent power to carry the price above natural and normally competitive market levels. It did not in fact do so.

(e) Prices in neighboring markets.

If the price in the Mid-Western market had outrun that in the neighboring markets, no doubt the Government would have urged that this was evidence that the buying had had some effect on competition in that area other than merely freeing it from the depressing effect of distress sales. But the fact is, as the Circuit Court of Appeals pointed out, that the prices in this area did not fully keep pace with those in other areas of the country. The prices in the Mid-Western area prevailingly lagged behind those in the rest of the United States.

The Court will get a graphic picture of these important price relationships over the whole period from Defendants' Exhibit 1013.

The only inferences permissible from this circumstantial evidence are inconsistent with the Government's claim

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[23]See p. 314, n. 9, *supra*.

as to the effect of a buying program on competition in the Mid-Western area.

(f) Competitive forces over which the respondents had no control.

There is uncontradicted evidence that if the respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary non-competitive price through these purchases, they would have been without power to do so. The customers of independent refiners were free to change their sources of supply if the refiners attempted to secure artificially high and non-competitive prices.[24] They were, in the main, jobbers who were either selling unbranded products or brands of their own creation so there would not be the obstacle of having to establish a new brand if they shifted their sources of supply.[24] The capacity of independent refiners in the area who were not claimed to have been co-conspirators was greater than that of those named in the indictment.[25]

The testimony shows that there were major companies, like the Texas and Gulf Companies, which were indicted but dismissed for failure of proof, and like the Standard of Ohio and the Sun Oil Company which were not indicted, which did business either throughout or at various points in this marketing area. Further, the boundaries of this area were not walled in and made a special preserve of the Mid-Continent refiners. Under the prevailing freight rate structure, the products of refiners in neighboring areas could readily flow into the area. It was the uncontradicted

[24]Swensrud, R. 1441.

[25]Swensrud, R. 1406-7; Def. Ex. 939, R. 3611.

testimony that the actual and potential competition in this area, which was beyond the control of these respondents, put it out of their power to make artificial and non-competitive prices in this area. Not only, therefore, was there no evidence to show that the respondents intended to do more, or did do more, than free competition from the effect of an abuse, but the evidence is uncontradicted that, by reason of the competitive forces outside their control, they had no power to do more.

(g) Effect of the combination on "fair competitive opportunities."

In the *Appalachian* case, this Court h ld that the combination was not monopolistic and did not unfairly affect competitive opportunities. Was there evidence which would support a different finding in this case?

How has the Government established any destruction of *fair* competitive opportunities? We emphasize "fair" because that is the determining word. The small independent refiners certainly benefited from the respondents' activities. It helped preserve their opportunity to compete when prices below cost were threatening to wipe them out—threatening to wipe them out, not because they were inefficient but because of conditions in the industry over which they had no control. Many jobbers benefited also. For distress sales often meant that the regular jobber in his trade was confronted with the competition of distress gasoline sold at below the market price and so was subjected to a particularly destructive, if not unfair, form of competition.[26]

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[26] Arnott, R. 1691-2.

Again, can anyone be said to have been injured because the elimination of distress sales was a factor contributing to the return of the tank car price to parity with crude? Hardly. Lack of parity and distress sales, as both the Petroleum Administration and the industry recognized, caused price wars which were highly destructive of "fair competitive opportunities" in the marketing business.[27] In the name of fair competitive opportunities, could anyone claim that he had a prescriptive right to have the evil of distress sales go uncorrected so that he might continue to buy gasoline below parity with crude, and thereby build up the pressure to destroy the conservation level of crude prices?

It is claimed by the Government that the correction of the evil of distress gasoline created an inequality in bargaining between the jobbers and the independent refiners.[28] But did such inequality exist, except in the imagination of Government counsel? There is certainly no evidence to support it. In the first place, a glance at Exhibit 1024[29] —sales by independent refiners to jobbers—shows a constant variation in prices in different sales on the same day which indicates active bargaining. Moreover, if there had in fact been any such inequality, we would certainly have expected the price of gasoline to advance above parity. It never did.

We are bound to concede that there may have been certain buyers whose "competitive opportunities" were injuriously affected, but there were none whose "fair competitive opportunities" could have been injuriously

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[27] McDowell, R. 1168; Frey, redirect, R. 1328, 1332.

[28] B. 44.

[29] p. 66, *supra*.

affected. As in the *Appalachian* case, there were, no doubt, many speculative buyers who preyed on the situation by using inequality of bargaining power to get products at prices below the prevailing market, even when that market was two cents below cost of production, and who made a profit by reselling at that prevailing market. Those whose technique it was to get a special advantage out of the distress situation, whether of the coal operators or of the independent refiners, undoubtedly had to revise their business methods. But, if this did not mean the destruction of "fair competitive opportunities" in the *Appalachian* case, how can it be held to do so in this case?

E. The failure of the Circuit Court of Appeals to reverse on this point was due entirely to errors of law.

The opinion of the Circuit Court of Appeals contains a statement of the evidence as we have reviewed it above, and the opinion indicates that the evidence supports all of the inferences which we contend should be drawn from it.

Why, then, did the Circuit Court refuse to hold that it was error to deny the respondents' motions for directed verdicts? The opinion states that except for one fact—that the plan was placed in actual operation—the combination was controlled by the decision of this court in the *Appalachian Coals* case. In speaking of the plan approved in that case, the Circuit Court stated:

> "• • • the Court held the 'plan would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain.' It also stated that the evidence failed to show that 'any effect will be produced which in the circum-

> stances of this industry will be detrimental to fair competition.' As we have pointed out, however, the court there was dealing with a plan which had not been placed in operation. Here we are considering a plan placed in operation with the results revealed. Under these circumstances, it was a jury question as to the effect which the plan in operation had upon fair competition and its resultant effect upon restraint of trade." (R. 3939, see also R. 3931, 3933.)

The respondents submit that this ground of decision was erroneous. A plan or agreement which has been put into operation may raise no more of a jury question than one which is still executory.

In either case the question is whether the facts show that the plan involves an undue restraint on competition. Its actual workings merely throw valuable light on what the plan really was and what its effects would be.

Further, the Court below seems to have lost sight of the fact that there was no substantial conflict in the evidence here but merely as to the inferences which it was claimed should be drawn from the facts. The Circuit Court of Appeals, it seems to us, clearly indicates, that innocent inferences are permissible from those circumstances. (See R. 3933.) It has lost sight, however, of the rule of law that, if nothing more than that were so, the respondents were entitled to directed verdicts.

As we have pointed out above (pp. 300-1, *supra*) if the circumstances are consistent with innocence, then, on a trial under an indictment, the jury cannot be left to speculate as between conflicting permissible inferences because, from the very statement of the case, the Government must establish its proof beyond a reasonable doubt. Even

though a trial judge might, if he himself were the trier of the fact in an equity case, be inclined to decide against the defendants; still, under the stricter rule of proof in a trial of an indictment, he is obliged to direct a verdict, the Government having chosen that forum.

For the reasons we have given above, we are convinced that the circumstantial evidence in this case is not consistent with guilt; that the *only* reasonable inference from the facts as to what occurred was that the only effect that the concerted buying did have and the only effect it could have, was merely to free competition from the distorting effect of recognized competitive abuses. It is not our burden, however, to show this.[1]

At the very least, it can be said that the circumstantial evidence permits such a conclusion. That is enough not only to require a reversal on the ground of the denial of the motions for directed verdicts but also the dismissal of this indictment.

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[1]See p. 300-1, *supra*.

VIII.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN HAD JURISDICTION TO TRY THE RESPONDENTS.[1]

This Court has granted certiorari to review the decision of the Circuit Court of Appeals (Sparks, J., dissenting) that the District Court for the Western District of Wisconsin had jurisdiction to try these respondents.

The Sixth Amendment to the Constitution guarantees to the accused in a criminal case the right to a speedy and public trial "by an impartial jury of the state and district wherein the crime shall have been committed."

A. Jurisdiction in this case depends on a showing of the commission of an overt act in the Western District of Wisconsin.

The respondents in this case concertedly purchased distress gasoline from independent refiners at going market prices. All of those purchases were made outside of the Western District of Wisconsin. Those purchases contributed to a rise in spot market prices. General wholesale and retail prices reacted correspondingly as they always had. Certain corporate respondents during the period while they were purchasing distress gasoline continued their regular course of business of selling gasoline

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[1]This question was raised in the Circuit Court of Appeals by Assignments of Errors 1-16, 18 and 19 (R. 2518, 2519) and was decided adversely to the respondents, with one judge dissenting (R. 3942-4, 3950-3). It comes before this Court as the first question presented by the respondents' cross-petition in No. 347 (Cross-Pet. 2).

at wholesale and retail throughout the Mid-Western area, including the Western District of Wisconsin. The prices at which they sold were, like prices charged by other concerns doing business in that area, affected by the rise in tank-car prices. The question of whether the trial court had jurisdiction depends on whether or not there was sufficient evidence that such sales in the Western District of Wisconsin were overt acts constituting a part of the joint activity of the respondents.

In answering this question it is first necessary to examine the basis of the rule that an overt act[1] done by any one conspirator in a particular district establishes jurisdiction in that district over all the co-conspirators, whether or not they have ever been in the district.

B. The determination of whether a given act is overt depends upon principles of agency.

The doctrine of overt acts is founded on the law of partnership and of agency. A conspiracy has been described by Justice Holmes as "a partnership in crime."[2] Participants in a conspiracy, like members of any other partnership, become, in the eyes of the law, agents for each other in the common enterprise. It is, therefore, legitimate for jurisdictional purposes to treat the act of *one* partner done within the scope of and for the purpose

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[1]An overt act has been defined variously as an act "in pursuance of the conspiracy" (*Williams* v. *United States*, 295 Fed. 302, 304 [C. C. A. 5th, 1923]), an act "in furtherance of the common object" (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249 [1917]) and an act which "must have the conspiracy in view and have some power to effect it" (*Hyde* v. *United States*, 225 U. S. 347 [1912]).

[2]*U. S.* v. *Kissel*, 218 U. S. 601, 608 (1910).

of aiding the common enterprise as the joint act of *all*. That is the rule in the case of any partnership. But it would fly squarely in the face of the constitutional guarantee of trial in the district in which the crime was committed, to base jurisdiction solely upon an act by one conspirator which cannot fairly be said to be an act within the scope of his agency and which is consequently not also the joint act of his co-conspirators who are not physically present in that jurisdiction.

It is our contention and the view of the minority of the Court below that this is just what has been done in this case. The individual act within the district of a particular conspirator, in the ordinary course of his business, in which he enjoyed the *beneficial* results of the successful effectuation of a conspiracy carried out in *another district*, has been treated as an act done by him within the scope of his agency without evidence to support that conclusion.

To determine whether a given act done while a person is engaged in a conspiracy was his own individual act or whether it was something that he was doing as agent for his "partners in crime" it is necessary, as in the case of any partnership, to look to the agreement which is found to have created the "partnership." The question is: Was the act one coming within the agreed joint activity of the partners or was it one he was doing in the course of his individual affairs?

C. The acts claimed to be overt.

The acts relied on by the Government as constituting overt acts consisted of making contracts with and sales and deliveries to jobbers, dealers and consumers by cer-

tain of the respondents in the course of their respective businesses in the Western District of Wisconsin. To determine whether any one of these acts was done by a co-conspirator as his own individual act or whether it was something that he was doing as agent for his "partners in crime," it is necessary to look at the agreement which is found to have created the "partnership." If the act was one which it was agreed or understood should be done by one or more conspirators as the joint act of all in the joint enterprise, then the act was an overt act and, on the principle of agency, binds all. But if the act was outside the scope of the authority conferred by the agreement and was of such character that no one under the agreement was to perform it or cause it to be performed, then the act cannot be said to have been done "in pursuance of the conspiracy."

D. The scope of the alleged conspiracy.

The question here, of course, is not whether sales in Wisconsin were charged in the indictment as acts agreed to be done, but whether it has been proved that they were made as the joint acts of the respondents. The detailed evidence as to the formation of this alleged conspiracy, and as to what the various participants agreed to do by way of joint activity under its terms (discussed at length in the Statement of Facts, and again in Points I and VII), was described by the Court below as showing an agreement that

> "• • • the major companies would purchase from the independent refiners the latters' surplus gasoline at going market prices."[1]

[1] R. 3919.

There is in the record no word of any other joint obligation or joint activity agreed to be undertaken. The Government has not attempted to point to any such evidence, though it is essential for it to do so if jurisdiction is to be established.

Such effect as this concerted buying had on retail and jobber prices has been conceded by the Government[2] to have followed through the customary working of the market mechanism. The alleged conspiracy was limited to a restraint of competition in buying and selling on the spot market.

E. Since the agreement did not extend beyond purchasing on the spot market, sales at wholesale and retail in the Western District of Wisconsin did not constitute overt acts.

1. *The Trenton Potteries case is not controlling. The conspiracy agreement in that case called for the performance of the very acts held to be overt.*

The Government contends (B. 130-1) that the question presented is controlled by the case of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). In that case this Court held that sales at agreed-on prices were overt acts because they were the very acts which the conspirators had agreed to do. It was alleged and proved that the defendant manufacturers had agreed that they would sell sanitary pottery throughout the United States only at prices which they mutually agreed upon. Price bulletins were circulated and sales at the agreed-on prices were made in the Southern District of New York. On these facts this

[2] R. 2308.

Court held that an overt act had been committed within the Southern District of New York. The basis of its decision is stated in the opinion as follows:

> "* * * The record is replete with the evidence of witnesses for both prosecution and defense, including some of the accused, who testified without contradiction to the course of business within the district, *the circulation of price bulletins, and the making of sales there by some of the members of the association organized by respondents. The Secretary testified that, acting for the association, he effected sales within the district.* All of these were overt acts sufficient for jurisdictional requirements. * * *" (273 U. S. at 403-4. Italics supplied.)

In order to come within the doctrine of the *Trenton Potteries* case, therefore, the Government must point to proof that the respondents entered into an agreement as to the manner in which they would sell to jobbers, and consumers in Wisconsin. Or, to put the matter conversely, if the respondents were free to sell to jobbers and consumers at any price they chose, the *Trenton Potteries* case has no application.

2. *At the trial the Government conceded that respondents did not agree to make sales only on a spot market basis.*

The Government recognizes the difficulty.[1] To meet it, it contends that the respondents "were not free to sell as

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[1]In the Government's discussion of the *Trenton Potteries* case (B. 132), it seems to be suggested that since a certain act was held to be in furtherance of one plan in regard to prices, the rule of *stare decisis* makes that act an overt act in regard to every other plan affecting prices whether or not the conspiracies are similar. We do not suppose, however, that an argument so clearly ignoring the basis for the doctrine of overt acts is seriously urged.

they pleased in the Mid-Western areas" (B. 134) "since an obligation to adhere to their price practice of selling on the basis of spot market prices was implicit in their unlawful agreement" (B. 135).

In plain language, the Government now claims that it was part of the conspiracy agreement that each of the respondents bound himself to sell in the Western District of Wisconsin on the basis of spot market prices.

The first thing to note about this contention is that the Government is in no position to make it. It flies directly in the face of concessions which it has made in the course of the trial and in its bill of particulars, which is in effect a part of the pleadings. The Government in the course of the trial and in the course of argument on demurrers to the indictment conceded repeatedly that there was no charge of any agreement among the respondents to sell only on the basis of spot market prices. These concessions were made in response to repeated questions of counsel for the respondents, who were acutely aware of the importance of the issue in connection with the matter of jurisdiction and endeavored to make the matter clear even before the trial started. In response to Mr. Donovan's question:

> "Is it your contention that it is stated anywhere in this paragraph or anywhere in the indictment that the defendants agreed among themselves that they would sell to the jobbers only at the average spot market price that you have described?"

Counsel replied:

> "I will state now that this paragraph does not intend to charge and does not charge that the defendants agreed together to do business only on the basis

> of this contract. The contract, *the substance of it*, is set forth in paragraph 11 * * * I will stand by that —I don't think that charge is made in this indictment."[2]

This concession was repeated during the course of the trial in the following language:

> "There is no charge in the indictment, and counsel has stated it repeatedly during the trial, there is no charge in the indictment of an agreement with respect to these contracts."[3]

Finally and conclusively, prior to the trial, the respondents sought and obtained a bill of particulars from the Government. In that bill it is stated explicitly:

> "The Government does not claim that each defendant entered into an agreement not to sell jobbers except in accordance with 'the contract described in paragraph 11 of the indictment.'"

If the Government did not claim when it filed its bill of particulars that each defendant agreed not to sell to jobbers except upon contracts based on the spot market, how can it do so now?

In the course of the trial the Government made similar concessions that the retail price[4] was not established by agreement. The evidence showed that the Standard Oil

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[2]R. 56.

[3]R. 296. Note that this statement was no mere accident, no slip of the tongue by counsel. It was their deliberately chosen, carefully thought out position asserted "repeatedly during the trial."

[4]The dealer price was a function of the retail price. Beroth, R. 185; Wingrove, R. 235; Lanzer, R. 254; Breuch, R. 276, 286; Fee, R. 289-90; H. E. Miller, R. 306; Middleton, R. 314; Thompson, R. 322, 324-5; Crowley, R. 328; O'Brien, R. 333-4.

Company (Indiana) was the market leader and that no one could sell at a higher price.[5] It also showed that at various times Standard of Indiana was forced to reduce its price to meet the competition of others.[6] Counsel for the Government stated:

> "• • • We do not say that the Standard of Indiana when it posts a retail price first consults with the other companies to find out what retail price should be posted" (R. 2308).
>
> "If that is what you're worrying about, if you think we're charging you with sitting around a table and agreeing on a uniform retail price, don't worry because that isn't what we are charging" (R. 2294).

The Government attempts to evade the effect of these concessions by saying: "It was not essential to the objectives of the conspiracy that the defendants adopt any particular form of jobber contract or follow the retail price policy of any particular company" (B. 135). But the concessions are clearly directed to the broad question of whether or not it was claimed that the respondents agreed to sell only on contracts *based on the spot market*. The purpose and effect of paragraph 11 of the indictment is to charge that gasoline was sold not "on any particular form of contract" *but on contracts whose price provisions referred to the spot market.*[7] Moreover, as can be seen from the quotations above, the concessions were made in response to the question of whether it was contended that

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[5]Shatford, R. 1085; Marshall, R. 1233, 1246-47.

[6]Marshall, R. 1249-50, Def. Ex. 910-11, R. 3509-10.

[7]The indictment does not set forth the specific language of any contract, but is merely a summary of substance. Chaffetz, R. 56.

the respondents agreed among themselves to sell only on the basis of spot market prices.

The concession as to the retail price is equally broad. Since the Standard Oil Company (Indiana) calculated its retail price on the basis of the spot market, an admission that the respondents did not agree to follow the Standard of Indiana price is also an admission that they did not agree to determine their retail prices on the basis of the spot market.

3. *The evidence did not establish an agreement on the part of the respondents to sell only on a spot market basis.*

Assume, however, that the Government was in a position to argue that it was part of the conspiracy agreement that the respondents bound themselves not to sell gasoline in the Western District of Wisconsin except on the basis of spot market prices. It is unable to point to any direct evidence of such an agreement. Is there, however, circumstantial evidence which establishes its existence?

The Government suggests that the respondents' objective was to secure through their buying activities higher prices and that they could not do so except by continuing to sell at wholesale and retail on the basis of spot market prices only.

Ignore the fact that all the affirmative evidence and the Government's admissions negative the existence of such an agreement. Assume *arguendo* that the objective was as stated.[8] Putting all that aside, is it true that *unless re-*

[8]Of course, it was not, except in the same sense that the objective of the combinations in the *Appalachian, Maple Flooring* and *Cement* cases was the making of sales at higher prices by their members because that would be their result.

spondents were bound by some agreement to sell gasoline in the Mid-Western area and the Western District of Wisconsin only on the basis of spot market prices they could not have sold to their jobbers and at retail at higher prices?

The answer is that distress gasoline commanded a lower price than any other gasoline in the market. Under any conceivable marketing system, *regardless of whether prices were in terms based upon the spot market or not*, the distress gasoline which was sold by independent refiners to jobbers on a spot basis would have forced down the price at which any other company could have sold to any other jobber on any basis. That result would follow because, as seems to be conceded by the Government (B. 10, note 9), jobbers selling in competition with jobbers buying distress gasoline from independent refiners would have had to buy their gasoline on equally good terms or be forced out of business.[9] The same economic rule would apply in subsequent stages of the marketing process. Gasoline sold to dealers and at retail would still have to meet the competition of distress gasoline. Removal of distress gasoline then, involved removal of a factor which depressed the whole price level regardless of the pricing system employed. It follows, therefore, that regardless of whether respondents sold to jobbers and at retail on a basis which specifically referred to the spot market, or whether they sold in some entirely different way, removal of distress

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[9]The principle is true regardless of the fact that much of the distress gasoline was third grade and that jobbers selling house brand gasoline could secure a slightly higher price than those selling third grade gasoline. The fact remains that, as stated in the indictment (Paragraph 16), there is an inevitable relationship between the two prices and that one could not drop without forcing down the other (Swensrud, R. 1405).

gasoline would tend to produce an improvement in the prices at which respondents could sell at wholesale and at retail.

The assumption that a rise in the spot market prices would only be reflected in the general wholesale and retail markets if the respondents *agreed to bind themselves to follow a particular course of action in the course of their business in those markets* ignores the natural and historic functioning of this market, which the evidence discloses and which the indictment itself describes.

The spot tank-car market had, through the workings of competition, long established itself as the *basic market* in this area. Through the operation of competition the general wholesale and retail markets have reflected the rise and fall of the spot market even when that spot market price was from 1¢ to 2¢ per gallon below the cost of production.

When a depressing factor on that price, such as hot oil, was removed by the first Tender Board in 1934, the rise in the spot tank-car market was immediately reflected, as we would expect it to be, by a corresponding rise in the retail market. This is graphically illustrated by Respondents' Exhibit No. 1013 (page 72, *supra*). It is the normal behavior of markets that when for any reason the price in the basic market goes up or down there is a natural tendency for the subsequent markets to reflect that rise or fall correspondingly. There is not a shadow of a basis for the assumption that this effect on wholesale or retail markets requires agreements among wholesalers or retailers.

It cannot be seriously contended that the respondent companies and the other companies selling in competition with them could and did secure the benefits of the rise in

the spot market price due to the elimination of hot oil in 1934 only by *agreeing to bind* themselves to continue to base their wholesale and retail prices on the spot market prices.

Let us test the claim of the Government by reference to the *Maple Flooring* case (*supra*, p. 150), decided by this Court. In that case the specific agreement related to the collection and dissemination of trade information. This Court found that the effect of collecting and disseminating such information would be to enhance and stabilize prices. Obviously, therefore, the defendants in the *Maple Flooring* case were chargeable with intending to raise or stabilize prices. According to the Government in this case, there must have been an agreement in the *Maple Flooring* case, established by inescapable inference, not merely to gather and disseminate information, but, in order to accomplish the purpose of the agreement, to sell only at enhanced and stabilized prices. But as this Court pointed out in that very case, prices were raised not by reason of an agreement relating to selling prices, but by reason of a change in competitive conditions. So in this case, competition continued unabated, but it operated in the absence of a competitive evil which had abnormally depressed it. The mere removal of the competitive evil would result in a more normal competitive price.

The allegedly desired effect would have been produced *regardless of the pricing system employed* and the argument of the Government is, therefore, based on a false premise.

It is also a clear *non sequitur*. There was no need of an agreement to sell only on the basis of spot market prices unless there w some reason to think that sales might be

made on some other basis. The evidence shows that the respondents and other companies in competition with them had been selling gasoline on a spot market basis since 1929 or 1930. There is not the slightest suggestion in the record that there was any question of a shift in practice by any respondent or by any other company selling in competition with any of them. There was no *necessity* for any agreement and therefore no basis whatever for inferring that it ever occurred to the respondents to consider making such an agreement—much less for finding beyond a reasonable doubt that they entered into it.

4. *The fact that respondents may have been motivated in part by the desire to secure better prices for their gasoline does not establish that their sales constituted overt acts. Mere action to secure individual benefit from a conspiracy is not such an act.*

The Circuit Court of Appeals suggests that the respondents could derive no pecuniary advantage from purchasing on the spot market unless that purchasing resulted in higher prices in the wholesale and retail markets in which they were selling, and that the circumstances therefore indicated that "an objective" of the alleged conspiracy was the increase of prices in those markets. From this the Court reasons that sales of gasoline by respondents in those markets tended to achieve an objective of the conspiracy and were in consequence overt acts.

In so holding, the Circuit Court of Appeals has, we submit, played upon words, and confused matters of motive and inducement with matters of joint action, and improperly endeavored to use the former as a measuring rod of

the existence of an overt act.[10] This, with all due respect, is not the law.[11]

It seems apparent that individual matters of motive and inducement furnish no reliable measure of the extent of a joint activity, and that to determine whether jurisdiction is present, *the agreement itself, not the reasons which led to its formation,* must be looked to.

If the lower Court's position is correct, it might with equal force be argued that the act of a partner in cashing a check which represents his share of the partnership profits is an act of the partnership. The prospect of sharing in the profits was undeniably the further objective which caused the members to form the partnership. The profits themselves are the benefits which flow from the partnership, a result which could not be achieved without its formation. But no one could claim that the individual partner's act in cashing his dividend check is the joint act of all the partners.

A review of the cases confirms the conclusion that the test of the scope of the agreement is not motive, and that the mere reaping of individual benefits from joint action does not constitute an overt act.

In *Lonabaugh* v. *United States,* 179 Fed. 476 (C. C. A. 8th, 1910) the defendants were convicted of conspiring to defraud the United States of possession and title to certain

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[10]This is clearly indicated, we submit, by the fact that the "circumstances" relied on did not point to the taking of any particular joint action since the "objective" in question could be attained in many different ways.

[11]*Lonabaugh* v. *U. S.*, 179 Fed. 476 (C. C. A., 8th, 1910); *United States* v. *Black*, 160 Fed. 431 (C. C. A. 7th, 1908); *Rose* v. *St. Clair*, 28 F. (2d) 189 (D. C. Va., 1928).

public lands by means of false entries. The conviction was reversed by the Circuit Court of Appeals, which held that the act of obtaining physical delivery of patents on such lands was not an overt act since title to the lands passed from the United States to the conspirators independent of such delivery. Consequently the defrauding of the United States of title which was the design of the conspiracy was fully accomplished independently of the doing of the acts claimed to have been overt.

Of course, one of the purposes and motives of the conspirators was to secure actual evidence of title to the property. But the agreement claimed to be criminal under the statute was one to defraud the United States of title to its land. Since that fraud was complete without securing delivery of the patents, the latter act did not further the object of the conspiracy even though it was a step in the enjoyment of the fruits of the conspiracy.

On the same ground, the Circuit Court of Appeals for the Seventh Circuit held in *United States* v. *Black*, 160 Fed. 431 (1908), that the payment of money to co-conspirators for making fraudulent entries as a part of a conspiracy to defraud the United States of possession and title to certain public lands was not an overt act, such payment having been made after the issuance of patents based on such fraudulent entries. Here again it was held that the fraud was completely independent of the acts claimed to be overt which were merely the satisfaction of individual motives for entering into the conspiracy.

Rose v. *St. Clair*, 28 F. (2d) 189 (D. C. Va., 1928), involved a conspiracy to violate the Act of July 31, 1912, which made it unlawful to transport in interstate commerce

prize fight pictures intended for public entertainment. The question presented was whether the exhibition of prize fight films which had been transported in violation of that Act constituted an overt act because it tended to effect the object of the conspiracy. Here again the purpose for which the films were transported was to profit from their subsequent exhibition. The court held that such exhibition did not further the object of the conspiracy, saying: "The object of the conspiracy * * * is confused with what may be conveniently called the ultimate purpose of the conspirators" (p. 191).

In each of these cases the alleged overt act—the obtaining of patents, or the exhibition of the prize fight films—was an act which was made possible by the execution of the conspiracy agreement. In each of these ca[illegible], also, the possibility of accomplishing the act relied on had furnished the motive for entering into the conspiracy agreement. In each case, however, the Court held that those facts alone were insufficient and that not being done in aid of carrying out the conspiracy agreement itself, they were not overt acts. In other words, the agreement defined the object of the conspiracy and, therefore, defined the character of the acts which could be said to be "in furtherance of" the objects of the conspiracy. An act was not overt unless it carried out the particular conspiracy agreement charged and was within the scope of the agency created.

The Government's attempted distinction of these cases, *i. e.* (B. 137):

> "Of course, when the conspiracy is completed subsequent acts are not in furtherance of its unlawful objective",

begs the question. The issue decided by these cases is: Is the mere attainment of an individual benefit of the conspiracy, even though it furnishes the motive for participation therein, a part of the common agreement so that the conspiracy is not completed until that benefit is attained? And the answer given, as is pointed out by Judge Sparks, in his dissenting opinion,[12] is that the common agreement does not extend to matters of individual inducement to, or the realization of individual benefits from, that participation.

5. *Sales at wholesale and retail did not constitute "continuous cooperation in keeping the conspiracy alive."*

The Government also argues that "selling to jobbers and consumers in the Mid-Western area" at the artificially enhanced prices, supplied part of the "continuous cooperation" necessary to keep the entire conspiracy alive, although there may not have been any "agreements specifically directed to that act." This is nothing more than a statement of the obvious fact that an overt act need not have been expressly agreed on by the conspirator *provided that it is a joint act which is done with the agreement in view and in furtherance of that agreement.* In effect it is a mere repetition of the argument already made

[12] Judge Sparks' dissent is not, as the Government asserts (B. 136), based upon a fundamental misconception of the Government's position, but merely takes the facts more strongly in the Government's favor for purposes of argument. If the sale by the respondents of the very distress gasoline which they had purchased in the course of the program, at prices affected by the *purchase* of that gasoline, did not constitute an overt act, *a fortiori,* the sale of gasoline refined by the respondents themselves and sold at such prices did not constitute such an act.

that there was an implied agreement to make such sales. We have noted above that prior to this appeal the Government has repeatedly conceded that there was no such agreement. (*Supra*, pp. 334-7.)

It has also been pointed out that such sales instead of being made in cooperation, were made in active competition among respondents.[13] It is a contradiction in terms to say that the respondents' competition among themselves in selling gasoline at wholesale and retail in the Mid-Western area constituted "cooperation." Moreover, the selling of gasoline at retail prices constantly varying in relation to tank car prices during the period from June to December, 1935 (shown by Defendants' Exhibit 1013, p. 72, *supra*) is the strongest kind of evidence that sales on a spot market basis were in no way "necessary to keep the conspiracy alive."

As pointed out in the dissenting opinion,

> "• • • The indictment does not allege, the Government does not contend, and the evidence does not disclose, that these sales in Wisconsin had any effect whatever on the raising, fixing, or maintaining of gasoline prices in Wisconsin, or elsewhere. • • •" (R. 3952).

The Government itself says:

> "The prices at which majors sold to jobbers in the mid-western area *automatically* advanced, under provisions of the jobber contracts, with each advance in mid-continent spot market prices. • • •" (B. 32).

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[13] Marshall, R. 1231-32.

If it is true, as counsel for the Government contend, that "if the defendants wanted to raise the retail price and wanted to raise the price to jobbers, *all* they had to do was to raise the spot market price,"[14] it is difficult to see how, even if that was what they wanted, action having nothing to do with the course of prices on the spot market could be described as "continuous cooperation necessary to keep the conspiracy alive."

6. *Under the reasoning of the Court below individual sales by members of a combination would constitute overt acts in virtually any Sherman Act case regardless of what was actually agreed to be done.*

The reasoning of the Circuit Court of Appeals, so far as the Sherman Act is concerned, would virtually abolish the constitutional guaranty of a trial in the district where the crime is committed and would substitute a permission to sue *wherever any one of the accused may be found to be doing business.* Under the decision of the majority the making of any sale by any defendant at any point after prices had been advanced as a result of the illegal restraint of competition in another district would always be an overt act regardless of the character of the conspiracy.

Consider some of the more familiar Sherman Act situations from this point of view.

In *Steers* v. *United States,* 192 Fed. 1 (C. C. A. 6th, 1911), the conspiracy in question involved the interference by threats of mob violence with shipments of tobacco in Kentucky. Kentucky growers were dissatisfied with the

[14] R. 2307.

market price and from time to time sought to increase it by preventing tobacco in Kentucky from reaching the market. Under the reasoning of the Court below, if any defendant in the *Steers* case had happened to be carrying on some stage of his tobacco business in the District of Columbia, for example, and had made sales there after the night riders had been at work in Kentucky destroying tobacco, then all of the defendants would have been triable in the District of Columbia. This would follow from the view of the majority of the Court below since to quote its words, it "would be illogical and contrary to common sense" to say that the "object" of the conspiracy was to restrain trade by preventing interstate shipment of the destroyed tobacco "without at the same time saying there was a further objective—the increase of the price that they might be able to secure in the ordinary course of their business in sales to their customers * * *."

In similar fashion, where, as in *Paterson Parchment Co.* v. *Story Parchment Co.*, 37 F. (2d) 537, (C. C. A. 1st, 1930) three manufacturers conspired to drive a newcomer out of a field by a price war, it would have to be held, under the reasoning of the Court below, that an object of the conspiracy to restrain competition by killing off the competitor was to secure an increase in price or share of the business. Otherwise, how could the defendants gain any advantage from their action? If that "motive" was the "object" and an act to satisfy it an overt act, then all of the defendants could have been prosecuted whenever and wherever any defendant made a sale after the destruction of the competitor. Further, it would seem that the statute of limitations would never begin to run until some way had been found to resurrect the destroyed competitor.

In *United States* v. *Great Western Sugar Co.*, 39 Fed. (2nd) 152 (D. C. Nebr., 1930) a defendant sought to prevent the entrance of a new competitor into the field by agreeing to pay increased prices for its raw material. It would be "contrary to common sense" to suppose that the defendant did not do this in order to secure prices from its customers that would be more favorable than if the new firm entered the field. If the making of sales at such prices was the object of the conspiracy rather than the restraint of competition involved in preventing the new firm from coming into operation by the method described, then the Government in the *Great Western* case could have avoided the statute of limitations which was held to bar the prosecution by alleging as an overt act any sale of sugar by the defendant at any place in the United States within three years of the indictment. If the Government is right the statute could only be made to begin to run by the conception anew of the embryo competitor since, until then, it might be argued that prices would remain different from what they would have been had the new unit entered the field.

7. *Whatever the object of the plan, the proof does not show that any act having the alleged conspiracy in view was done in the Western District of Wisconsin.*

(*a*) Where an act is subject to more than one interpretation *the prosecution must show beyond a reasonable doubt that it was undertaken with the conspiracy in view and not as an individual act.* An indispensable requisite of an overt act is that it shall have been done with the conspiracy in view, *i. e.*, for the purpose of carrying out the

conspiracy. (*Hyde* v. *United States, supra.*) Otherwise, the act would not be that of an agent and would not be binding upon other participants in the plan.

A showing that the act in question was one which *could have been done* within the scope of the partnership agreement and with that agreement in view is, of course, not of itself sufficient if under the circumstances the act could also have been done as an individual matter. The act would then merely be ambiguous and it would be necessary to examine the intent of the partner in performing the act in question to determine whether such act was that of an individual acting for himself or of a partner acting for the partnership. Unless the party seeking to assert liability in the principal can, in such an ambiguous situation, show that the action in question was taken by the alleged agent *as such agent* and not in the individual conduct of his own affairs, liability cannot attach.

The case at bar even on the strongest assumption of the Government as to the terms of the partnership agreement would be similar in this respect to an action brought against a partnership on a note signed by one partner. On the face of it, the signature of the note could be either the individual act of the partner who signed or act of the partnership through such partner. The presumption is that it is his individual act.[15] To recover against the partnership the holder would have to overcome such presumption and show that the person who signed intended to act for the firm and not in his individual capacity.[16] If, as this Court

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[15] *Frederick* v. *Citizens National Bank*, 231 Fed. 667 (C. C. A. 3rd, 1916); *Reed* v. *Dunlap*, 280 Fed. 380 (C. C. A. 8th, 1922).

[16] "* * * An obligation executed by the members of a firm in their names may share as a partnership debt in the administration

has repeatedly declared, the binding nature of an overt act depends on principles of agency,[17] the same rule applies in criminal cases[18] with the single qualification that to overcome the presumption, the intent to act for the partnership or conspiracy and not individually must be shown beyond a reasonable doubt rather than by a mere preponderance of the evidence.

(*b*) *Respondents' sales in Wisconsin were not shown to have been made for the purpose of carrying out any joint enterprise.* Contracting with jobbers and selling to jobbers and at retail in the Western District of Wisconsin are the acts claimed by the Government to have been done to carry out the allegedly illegal plans. The proof showed that

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of the partnership assets in bankruptcy proceedings, upon extrinsic evidence showing that the obligation, although executed in the names of the partners individually, *was in fact intended as a partnership obligation,* incurred for its benefit in furtherance of the firm business and for a consideration received by it." (Italics supplied.) *In Re Nashville Laundry Company,* 240 Fed. 795 (D. C. 10, 1917), *Frederick* v. *Citizens National Bank, supra, Reed* v. *Dunlap, supra.*

[17]"The rule of evidence is commonly applied in criminal cases but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229 at 249 (1917); *United States* v. *Gooding,* 12 Wheat. 460, 469 (1827, Story, J.). *American Fur Co.* v. *United States,* 2 Peters 362, 365 (1829); *Logan* v. *United States,* 144 U. S. 263, 309 (1891).

[18]*Hitchman Coal & Coke Co.* v. *Mitchell, supra; United States* v. *Gooding, supra.*

respondents had, for at least five or six years prior to the alleged conspiracy, been making contracts and sales in Wisconsin on a price basis involving reference to the spot market. During the continuance of the buying program and after its conclusion, they continued to make sales and contracts in the same way and on the same price basis which they had always used.[19] On their face, the acts relied upon were nothing more than the usual and normal conduct of the respondents' business. As in the partnership note cases,[20] therefore, the presumption is that the acts were done in an individual and not in an agency capacity.

In this situation it devolved upon the Government to overcome the presumption that such acts were individual acts by proof beyond a reasonable doubt that these sales and contracts not only *could have been made* for the purpose of carrying out the alleged conspiracy *but were in fact so made.* Not only has the Government failed to sustain this burden, but the record will be searched in vain for even a scintilla of evidence indicating that such sales and contracts were made with the conspiracy in view. Nothing in it even suggests that these sales and contracts were not what they appear to be, *i. e.*, sales undertaken by each of the respondents individually without reference to any understanding with any other company and with the

[19]Peterson, R. 298. As already pointed out, there is no evidence that respondents either agreed on a price of so many cents a gallon to jobbers, retailers and consumers and caused that price to become the market price by refusing to sell at any other, as was done in *United States* v. *Trenton Potteries, supra,* or that they agreed to make sales on any particular price basis, and it has been conceded by the Government that they did not do so.

[20]*Supra,* footnote 1, page 350.

individual purpose on the part of each of continuing its regular business in its regular way. Where the respondents had been selling gasoline in Wisconsin for many years it would strain inferences beyond the breaking point to contend that they continued their long established business in the identical manner in which it had for years been conducted, not as an individual matter but with the idea of carrying out a conspiracy which the Government says could have been effectuated merely by raising the spot market price.[21] In the absence of evidence to the contrary, it seems a self-evident contradiction in terms to say that respondents' persistence in their usual course of trade without any agreement among themselves to so continue was an action undertaken in view of the alleged conspiracy. But unless it has been shown beyond a reasonable doubt that such sales and contracts were so undertaken, they have not been proved to be overt acts and jurisdiction in the Western District of Wisconsin was lacking.

Summary

We have shown that an act is not overt unless it is an act of agency authorized by the illegal partnership agreement. Thus we must find an agreement to do some act in the Western District of Wisconsin. There is no evidence of an agreement among the respondents to base their Wisconsin prices upon the prices prevailing in the spot market. The Government so conceded in the argument on demurrer, in its bill of particulars,

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[21] "And we point out in the indictment that if the defendants wanted to raise the retail price and wanted to raise the price to jobbers, all they had to do was to raise the spot market price." (R. 2307—Mr. Chaffetz.)

and on the trial. Indeed the record evidence shows an agreement for joint activity not extending beyond purchases in the spot market. The supposed necessity of having such an agreement in order to accomplish the respondents' objects does not exist. The respondents' agreement was completely accomplished when they purchased distress gasoline in the Mid-Continent and East Texas oil fields. The mere removal of that gasoline, in and of itself, without any further restraint upon competition, permitted prices in the Western District of Wisconsin to rise. The Government failed to sustain the burden of showing that the sales were intended to be made as a part of a joint activity agreed on in a conspiracy rather than as individual transactions in the ordinary course of business. Accordingly the respondents' sales of gasoline in Wisconsin did not constitute overt acts on which to base jurisdiction.

CONCLUSION

It is respectfully submitted that the trial court committed reversible error and that this Court should order the respondents discharged.

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